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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

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NO. A-453

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DOLPH BRISCOE, Governor of Texas and STEVEN C. OAKS, Secretary of State of the State of Texas

Petitioners

v.

FRANK ESCALANTE, FRANK MOORE, JOHN DILLARD, T. R. DILLARD, and MARY DILLARD

Respondents

* * *

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

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This appeal is from a judgment of the United States District Court for the Western District of Texas, entered on October 31, 1977, in an action challenging the districting for the election to the Texas House of Representatives in Tarrant County. The decision of the Court below holds that a new plan with a population deviation of approximately 2% based on 1970 census figures should be substituted for the existing apportionment which has a 7.7% deviation according to 1970 census figures. Appellants submit this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial question is presented.

OPINION BELOW

The majority opinion, order, and dissenting opinion of the Court below are not yet reported. The majority opinion was issued on October 31, 1977, the dissenting opinion on November 3, 1977. The Order was entered on November 10, 1977. All are reproduced in the separately bound appendix. The opinion of the court entered on February 19, 1976, is reported at *Graves v. Barnes*, 408 F. Supp. 1050 (W.D. Tex. 1976). The apportionment order entered in 1976 and presently in effect in Tarrant County is reproduced in the separately bound appendix.

JURISDICTION

This is an appeal from an order of a three-judge federal district court entered November 10, 1977, adopting a new apportionment plan for state legislative seats in Tarrant County, Texas. Jurisdiction below was based on 28 U.S.C. §§1343 and 2281.

Notice of appeal from the lower court's order was filed on November 21, 1977. Application for a stay of the lower court's order was presented to Mr. Justice Powell, and, after referral to the full court, was granted by Mr. Justice Powell on December 5, 1977. Appellee's Motion for Rehearing was denied on December 12, 1977. The jurisdiction of this Court to review the judgment of the District Court on appeal rests on 28 U.S.C. §§1253 and 2101(b). Jurisdiction is supported by cases which required this case to be heard by a three-judge district court and recognize a direct appeal to this Court from the judgments thereof. *Chapman v. Meier*, 420 U.S. 1, 14 (1975); *White v. Regester*, 412 U.S. 755 (1973); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Skolnick v. State Electoral Board of Illinois*, 336 F. Supp. 839 (N.D. Ill. 1971); *Stout v. Hendricks*, 235 F. Supp. 556 (S.D. Ind. 1964).

QUESTIONS PRESENTED

I. WHETHER OR NOT THE MAJORITY ERRED IN REQUIRING THE STATE TO PROVE THAT A 7.7% POPULATION DEVIATION WAS NECESSARY TO COMPLY WITH STATE POLICY.

II. WHETHER OR NOT THE MAJORITY ERRED BY ADOPTING A PLAN WHICH FRUSTRATES STATE POLICY OVER AN EXISTING PLAN WHICH SATISFIES STATE POLICY AND ENTAILS ONLY A MINIMAL POPULATION DEVIATION.

III. WHETHER OR NOT THE MAJORITY ERRED IN FAILING TO BALANCE THE EQUITIES IN THE CONTROVERSY.

IV. WHETHER OR NOT THE MAJORITY ABUSED ITS DISCRETION BY ORDERING A REMEDY BEYOND THE NATURE OF ANY CONSTITUTIONAL VIOLATION.

STATEMENT

This litigation has been before the United States Supreme Court on three prior occasions. The first round of the litigation began in 1971 with consolidated cases challenging the validity of all House and Senate legislative districts in the State of Texas as drawn by the Texas Legislative Redistricting Board. The three-judge federal district court sustained the reapportionment plan for the Texas Senate but held that the plan for the House of Representatives contained deviations of population equality and two multi-member districts that were constitutionally invalid. *Graves v. Barnes*, 343 F. Supp. 704 (W.D. Tex. 1972). On June 18, 1973, the United States Supreme Court affirmed the lower

court's holding regarding the constitutionality of the Senate reapportionment plan and the unconstitutionality of the two multi-member House of Representative districts, but remanded "for dismissal if the case is or becomes moot." *White v. Regester*, 422 U.S. 935, 936 (1975).[1]

Following remand of this case, the Texas legislative reapportionment act in question, H.B. 1097, 1975 Tex. Gen. Laws, 64th Leg., ch. 727, p. 2356, was submitted to the United States Justice Department for approval pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. §1973c. On January 23, 1976, the United States Attorney General made known his objections to those portions of H.B. 1097 prescribing single-member districts for Tarrant, Nueces and Jefferson counties, thus rendering those portions of H.B. 1097 ineffective. On February 9, 1976, only shortly before April 3, 1976, state elections, the three-judge panel in this case convened and by orders issued on February 9, 1976, and February 19, 1976, declared this suit moot with regard to six of the nine districts in question as a result of H.B. 1097 and adopted single-member district plans for the three counties in which the provisions of H.B. 1097 did not take effect due to the objections of the U.S. Attorney General. Two of the plans, those for Nueces and Jefferson counties, were adopted as final plans with the agreement of the parties. The three judge panel adopted a plan offered on behalf of the State for Tarrant County, but retained jurisdiction of the plan:

[1]Steven C. Oaks, as Secretary of State, is the chief election officer of the State of Texas and Dolph Briscoe, Governor of the State of Texas, is the chief executive officer of the State. Until his resignation on October 17, 1977, Mark W. White, Jr., was Secretary of State of Texas and, therefore his name appears on earlier pleadings of this case as a Defendant. Steven C. Oaks took the oath of office as Secretary of State on November 7, 1977.

> Thus, the court retains jurisdiction of this action with respect to Tarrant County for possible further consideration after the 1976 elections. Upon motion of the plaintiffs or intervenors, subsequent to the elections, that the districting plan hereby adopted does not give fully adequate relief for the constitutional deprivations suffered by the minority communities in Tarrant County, the Court will consider setting another hearing, for the purpose of granting further relief if such is warranted.

Graves v. Barnes, 408 F. Supp. 1050, 1054 (W.D. Tex. 1976)

Plaintiffs Escalante, et al, sought a stay of the order of the three judge panel. On March 1, 1976, after having referred the matter to the full Court, Justice Powell denied Plaintiffs' application for stay.

Primary and general elections for 1976 were held pursuant to the 1976 plan. Nine state representatives were elected from the legislative districts of Tarrant County. These representatives were members of the Texas Legislature when it convened in January, 1977. During the session, no bill was introduced to reapportion the legislative districts of Tarrant, Nueces, or Jefferson counties. The Legislature adjourned on May 31, 1977. The lower court notified Defendants on June 29, 1977, that a final hearing would be held in this matter on July 12, 1977. On July 11, 1977, the first day of a special session called on school finance, the Texas Legislature passed resolutions calling for the court to make the 1976 plan final and setting forth the reasons for such action. On July 12, 1977, the final hearing was postponed until September 7, 1977.

The three-judge district court held a final hearing concerning Tarrant County on September 7 and 8, 1977. Both Plaintiffs and Defendants submitted evidence

regarding the impact of the 1976 reapportionment plan on minority access to the election process. Defendant urged the Court to retain the 1976 reapportionment plan, which had been submitted to the Court on behalf of the State at the 1976 hearing. Plaintiffs urged adoption of a new reapportionment plan similar to one adopted by the Court in 1974. In an opinion dated October 31, 1977, the majority of the three-judge court found that the 1976 plan provided minorities equal access to the election process, but nevertheless adopted the plan offered by the Plaintiffs due to its lower population deviation. Judge John Wood dissented in an opinion issued November 3, 1977. On November 10, 1977, the Court entered an order adopting the new plan. It is this order from which Petitioners seek relief.

ARGUMENT AND AUTHORITIES

I.

BY FAILING TO GIVE DEFERENCE TO THE EXISTING PLAN AS THAT WITH THE IMPRIMATUR OF THE TEXAS LEGISLATURE AND OTHER POLITICAL BODIES, THE MAJORITY ERRED IN ORDERING THE INSTITUTION OF A NEW PLAN.

The majority below erred by choosing to ignore all indicia of governmental support for the plan presented by the state and adopted as constitutional by the Court in 1976.[1] The majority of the court made no effort to reconcile requirements of the Constitution with legitimate state purposes, but instead brushed aside all

[1]For purposes of clarity, Petitioners will refer to the Plan offered by the State and adopted by the court on February 19, 1976, as the "1976 Plan" and the plan offered by Plaintiffs and adopted by the court on October 31, 1977, as the "1977 Plan."

state policy and interests by adopting the only plan before the court that had no basis in any legislative enactment and that failed to preserve existing voting precincts or the core of existing legislative districts. Despite the 1976 plan's correspondence to the legislative apportionment contained in House Bill 1097, its support by local and statewide elected bodies, and its service of legitimate state goals, the majority decided that the 1976 plan was not entitled to "indulgent review" and ordered the adoption of a new, 1977 plan, solely by virtue of that new plan's lower population deviations.

The 1976 plan was entitled to deference as one which has the imprimatur of the Texas Legislature and other political bodies. It was offered by the Attorney General of Texas on behalf of the Secretary of State and Governor of Texas. The plan was drawn and backed by the Tarrant County legislative delegation in an effort to overcome the objections raised by the U.S. Attorney General to the districts drawn in H.B. 1097, while retaining, to the extent possible, the state policy and district configurations contained in H.B. 1097.[2] There is no dispute that the plan retains three districts unchanged from H.B. 1097, while making only minor changes in others. *See Graves v. Barnes*, 408 F. Supp. 1050, 1054 (W.D. Tex. 1976); Majority Opinion (App. at 8).

Under this Court's holding in *White v. Weiser*, 412 U.S. 783 (1973), the similarity of the 1976 plan to H.B. 1097, coupled with the minor nature of the plan's

[2]The 1976 plan was developed after meetings with leaders of the Black and Mexican-American communities. The plan satisfied the objections of the Justice Department by establishing two districts of minority concentration, *Graves v. Barnes*, 408 F. Supp. 1050, 1051, n. 3, 1052 (1976), and has proven effective in providing minority access to the election process. Majority Opinion (App. at 13-15, 17).

population variation, mandates its adoption.[3] In overruling the trial court's rejection of a plan which "adhered to the basic district configurations" found in a statute properly held unconstitutional, this Court stated:

> a federal district court . . . should follow the policies and preferences of the State, as expressed . . . in the reapportionment plans proposed by the state legislature, whenever adherence to state policy does not detract from the requirements of the Federal Constitution . . . . In choosing among plans, a district court should not pre-empt the legislative task nor 'intrude upon state policy any more than necessary.' . . . Here those [political] decisions were made by the legislature in pursuit of what were deemed important state interests. Its decisions should not be unnecessarily put aside . . . .

Id. 795-96. Quite simply, when deciding between a 2% deviation and a 7.7% deviation, "the District Court's preferences do not override whatever state goals were embodied in [H.B. 1097] and, derivatively, in [the 1976 plan]." *White v. Weiser, supra* at 796.

Apportionment plans derived from legislation as well as those apportionments actually enacted by state

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[3]The majority's statement that "it is an unlikely argument - to proclaim as virtue a kinship with that which was riddled with vice" is directly contrary to the holding in *Weiser* and ignores the majority's own findings that the 1976 plan remedied the objectionable features of H.B. 1097. *See* n. 2, *supra.*

legislatures are entitled to judicial preference and indulgence. The contrary view of the majority below is directly counter to *White v. Weiser* and also is contrary to consistent rulings of the 5th Circuit, of which Texas is a part. *Perry v. City of Opelousas,* 515 F.2d 639 (5th Cir. 1975); *Wallace v. House,* 515 F.2d 619 (5th Cir. 1975), *remanded* 425 U.S. 947 (1976).[4]

In addition to the correspondence of the 1976 plan with H.B. 1097, as noted by Judge Wood in his dissent below:

> Not only does the State plan which was adopted as the Court Plan in our earlier decision now have the State's legislative and executive imprimatur, but also enjoys the stamp of approval of all the democratically elected City Council and other local governmental bodies within the County of Tarrant as well as the imprimatur of this Court and the Supreme Court.

(App. at 29, 34). The 1976 plan was approved *sub silento* by the Texas Legislature when it met in regular session from January through May of 1977.[5] To resolve any doubts, both houses of the Legislature passed resolutions during a special session called on school

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[4]On remand, the court in *Wallace* held that no deference is due a state's policy for multi-member districts, 538 F.2d 1138 (5th Cir. 1976), but the strong policy against multi-member districts clearly distinguishes that holding from one involving the configuration of single member districts. *See Chapman v. Meier,* 420 U.S. 1, 20-21 (1975).

[5]No legislative reapportionment bill was introduced during the session. The court ordered plans for Nueces and Jefferson counties also were left undisturbed. The Legislature had received no direction from the lower court that action on its part would be necessary to perpetuate the existent apportionments. (Wood, J., dissenting) (App. at 33).

finance calling on the court to make the 1976 plan permanent and setting out the reasons for such action. (App. at 61, 65). Furthermore, similar resolutions were passed by the city council of Arlington (App. at 68) and the Tarrant County Mayors Council (App. at 70), which consists of the Mayors from the 31 municipalities in Tarrant County. Witnesses from Tarrant County government testified to the adverse impact adoption of the new plan would have on their election responsibilities. When a constitutional plan that has been tested through application to primary and general elections is endowed with such widespread and unanimous support from the political bodies of a state, it is clearly entitled to judicial deference, for those bodies are

> by far the best situated to identify and then reconcile traditional state policies within the constitutionally mandated framework of substantial population equality.

Connor v. Finch, 431 U.S. 407, 415 (1977); *see also Gaffney v. Cummings*, 412 U.S. 735, 749, 754 (1973).

The majority below, without explanation, summarily refused to give effect to the views of these state and local officials since "mere endorsement of the plan adopted in this court" does not entail "a studied and thoughtful approach to the process of legislative apportionment." (App. at 9).[6] Concerning this unsupported conclusion of the majority, Texas can do no better than refer to the dissent of Judge Wood in his address to the contention that all of the elected officials

> are guided in their official acts in petitioning this Court for approval of the present Court

[6]This criticism is quite similar to that by the same judges in *Graves v. Barnes*, 343 F. Supp. 704, 717 (W.D. Tex. 1972), which was "obviously rejected" by the Supreme Court. (Wood, J., dissenting) (App. at 35-36).

> adopted plan by motivies of discrimination or are in the habit of adopting official resolutions or acts without appropriate study, conception or consideration. I refuse to make sure an outrageous assumption and I respectfully submit further that the endorsement by all of these bodies who are vitally concerned with this reapportionment problem refutes the contention of the majority that there was a failure to conduct 'a studied and thoughtful approach to the process of legislative apportionment.'

(App. at 34-35). The majority's view is directly contrary to the established presumption that state officials perform their duties knowledgeably and in good faith. *Barnes v. City of Gadsden*, 174 F. Supp. 64 (N.D. Ala. 1958), *aff'd.* 268 F.2d 593 (5th Cir. 1959), *cert. denied*, 361 U.S. 915 (1959); 63 AM. JUR. 2d, *Public Officers and Employees*, §539.

Accordingly, since the 1976 plan involves a deviation of only 7.7% and is the plan unanimously endorsed by the pertinent political bodies as furthering legitimate state policies, it should have been made permanent by the court below without any further showing by Defendants. *Connor v. Finch*, *supra* at 418; *White v. Regester*, *supra* at 674; *Gaffney v. Cummings*, *supra*. The "fact that another plan [was] conceived with lower deviations," *Gaffney v. Cummings*, *supra* at 741, did not provide the District Court with authority to impose its preferences over the state goals embodied in the 1976 plan. *See White v. Weiser*, *supra*.

II.

BY FAILING TO GIVE LEGITIMATE STATE POLICIES PROPER CONSIDERATION, THE MAJORITY ERRED IN ADOPTING A PLAN WHICH DOES VIOLENCE TO THOSE POLICIES.

Having determined that the 1976 plan was not entitled to deference as the state plan, the majority below purportedly applied what it termed "the Court's new relativist test" and compared "the efficacy of each [plan] in accomplishing legitimate state policy," citing *Chapman v. Meier*, 420 U.S. 1 (1975) and *Connor v. Finch, supra*. (App. at 19). The majority formulated its test from a quote taken out of context from *Connor v. Finch, supra*. Then, rather than comparing the relative compliance of the two plans with state policy, the majority misapplied its own announced formula by failing to give consideration to the state policy it found in the existing plan. Instead, it selected a plan that totally frustrated state policy over a statistically satisfactory plan that had been in use for almost two years.

The majority announced its new test as follows:

> [T]he new guidance we gain from *Connor* is that considerations of state policy that result in a statistically offensive plan 'cannot be viewed as controlling and persuasive when other, less statistically offensive, plans already devised are feasible [citations omitted].' *Connor, supra* [at 420].

(App. at 19). Initially, even admitting the validity of the majority's test, it is clear that it does not properly apply to the instant case since a 7.7% deviation is not "statistically offensive." No court has found such a deviation to be impermissible in any plan, legislative or

court ordered. In reversing this same majority's holding that other state representative districts in Texas were unconstitutional because of a population deviation of 9.9%, this Court said:

> For the reasons set out in *Gaffney v. Cummings, supra*, we do not consider relatively minor deviations among state legislative districts to substantially dilute the weight of individual votes in the larger districts so as to deprive individuals in these districts of fair and effective representation. Those reasons are as applicable to Texas as they are to Connecticut; and we cannot glean an equal protection violation from the single fact that two legis|ative districts in Texas differ from one another as much as 9.9%, when compared to the ideal district.

White v. Regester, supra at 764. In *Chapman* and *Connor* this Court was dealing with court ordered plans with respective deviations of 20.14% and 19.3%. The 7.7% population deviation in the instant case is simply not comparable to those figures. This Court has termed a population variance of 7.83% "insignificant," *Gaffney v. Cummings, supra* at 748, and one of 16.4% "relatively minor," *Mahan v. Howell*, 410 U.S. 315, 329 (1973). One member of this Court has construed its holdings to establish that "[d]eviations no greater than 8% are . . . to be deemed de minimus." *White v. Regester, supra* at 775 (opinion of Brennan, J.). Lower courts have approved plans with similar deviations. *E.g. Perry v. City of Opelousas*, 515 F.2d 639 (5th Cir. 1975) (6.2%); *Chapman v. Meier*, 407 F. Supp. 649 (D.N.D. 1975), on remand from 420 U.S. 1 (1975) (6.6%). The same three

judge court below unanimously approved reapportionment plans for legislative districts in Jefferson County and Nueces County which entailed deviations of 8.1% and 10% respectively. Thus by its own test, the majority below should not have even sought to apply its "relativist approach."

Furthermore, the language in *Connor* relied upon by the majority below was taken from *Chapman v. Meier, supra* at 26. In *Connor* the Court was referring to an alternative plan "that served the state policy . . . better than did the plan the court ultimately adopted," 431 U.S. at 420, and in *Chapman* to a plan that equally satisfied the state's policy, 420 U.S. at 25. By contrast, the majority below applied the language to an alternative plan that totally frustrated the state's policies. While paying lip service to a "relativist approach," the majority failed completely to compare the relative merits of the two plans from the viewpoint of state policy.

This Court has consistently recognized the legitimate state policy in maintaining the integrity of political subdivision lines. This policy is based in part upon the desire "of insuring some voice to political subdivisions, as political subdivisions." *Mahan v. Howell, supra* at 321, citing *Reynolds v. Sims, supra* at 580-81. *See also Connor v. Finch, supra* at 420; *Chapman v. Meier, supra* at 25. The relative superiority of the 1976 plan[7] in this

[7]The majority below placed emphasis on its conclusion that the 1977 plan "interrupts city coundaries slightly *fewer* times" than the 1976 plan. Majority Opinion (App. at 19) [emphasis supplied by the court]. The testimony relied on by the majority was the statement of Plaintiffs' witness that the 1976 plan cut city coundaries 34 times whereas the 1977 plan cut city boundaries 28 times. The State of Texas disputes these figures. However, even conceding the accuracy of the figures, the majority failed to acknowledge that all but six of the interruptions of city boundaries occurred between (continued on next page)

respect is demonstrated by the resolution of the Arlington City Council (App. at 68), which states in part that the 1977 plan would dilute the representation of that city. Similarly, the mayors of the many small communities in Tarrant County voiced their almost unanimous support for retention of the 1976 plan. (App. at 70). Furthermore, the majority below did not discuss the impact of the 1977 plan on the integrity of the city council district lines in the City of Fort Worth. (App. at 71). At the time of hearing in this matter, the State of Texas was unaware of the 1977 plan's adverse impact on the Fort Worth Independent School District. This impact was described by school district officials in an affidavit attached as an Appendix to Petitioner's Supplement to Application for Stay in this case.

A clear difference between the two plans in maintaining the integrity of political subdivision lines is apparent in the effect on voting precinct lines. It is undisputed that the 1977 plan will affect the integrity of between 70 and 100 voting precincts in Tarrant County

H.B. 1097 and the 1976 plan in the effort to meet Justice Department objections to H.B. 1097 by drafting a plan before the February, 1976, hearing. In addition, the Plaintiff's figures fail to reflect that the 1977 plan cuts the City of Fort Worth multiple times and makes no effort to respect its boundaries or core areas, while H.B. 1097 and the 1976 plan do not divide the City of Fort Worth in such a manner and are drawn in an effort to maintain the City's boundaries and core areas. With regard to the many smaller communities in Tarrant County, the majority failed to acknowledge the clear statement of preference by the mayors of those communities that the 1976 plan should be left in place. (App. at 70). Although the 1976 plan cut the boundaries of many of these smaller communities, the adverse effects of such a result have been ameliorated by the actions of Tarrant County in redrawing its precinct lines to accomodate city boundaries. Adoption of the 1977 plan, which would cut city boundaries again, but in different places, would only aggrevate the problem and require a new redrawing of precinct lines.

while retention of the 1976 plan would allow voting precincts to remain intact.[8] This Court previously has recognized the legitimacy of using voting precincts as the basis for drawing legislative districts. *Connor v. Finch, supra* at 424. A state may legitimately prefer to utilize the same voting precincts in all elections. *Id.* Otherwise the difficulties entailed by an election involving several different governmental bodies would be insurmountable; a state would be forced to hold separate elections for each governmental body for which voting precincts differ. It would be impossible for each voter to use the same polling place for each election. The attendant confusion of the voters, which would inevitably lead to reduced participation, is obvious.

Even the majority below acknowledges that the state policy of maintaining compact and contiguous districts is frustrated by the court's new 1977 plan. (App. at 21). States have a legitimate interest in maintaining compact and contiguous districts. *See Connor v. Finch, supra* at 422, 425; *Reynolds v. Sims, supra* at 518. An examination of the plats on the two plans allows one quickly to discern that the 1977 plan adopted by the majority constitutes a gerrymandering of urban, surburban, and rural areas into a crazy quilt assortment of non-compact districts,[9] whereas the 1976 plan establishes reasonably compact districts. *Compare* 1977 plan (App. at 60) *with* 1976 plan (App. at 59).

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[8]A variation of the 1976 plan which was offered by the state would leave voting precincts intact but would reduce the population deviation to 5.8%.

[9]Until Defendants pointed the matter out to Plaintiffs shortly before the September 7, 1977, hearing, the Plaintiffs' plan, through errors in its legal description, actually had a population deviation of over 15% and had some census tracts displaced from the district in which Plaintiffs intended them. As Plaintiffs' attorney explained to the court below: "we've always talked about what a contiguous district was. We found out we didn't have one, didn't we?" (Transcript, p. 451).

In the same vein, the 1977 plan is greatly inferior to the 1976 plan with respect to the preservation of communities of interest. In *Mahan v. Howell, supra*, this Court reversed a lower court decision which split counties to the effect that "[t]he opportunity of its voters to champion local legislation . . . is virtually nil." *Id.* at 324. Since many legislative disputes are upon urban-surburban-rural lines, a state has a clearly legitimate interest in preferring apportionments which provide for distinct representation of such areas. *See Reynolds v. Sims, supra* at 567, n. 43.

The 1976 plan met the objective of preserving communities of interest. Districts 32-A and 32-B, and the eastern portion of District 32-G are retained unchanged from H.B. 1097 and represents a single community of interest centered around the City of Arlington.[10] District 32-F represents a single community of interest commonly and historically known as the "northside" of the City of Fort Worth. District 32-F, 32-I and 32-H constitute the central core of the City of Fort Worth. District 32-E combines the northern rural and suburban areas of the county, including between 17 and 21 small incorporated cities, a community of interest recognized by H.B. 1097. District 32-C, retained unchanged from H.B. 1097, consists of a rapid growth area in south Tarrant County. District 32-D, which was retained from H.B. 1097 with only the change of one census tract, is an area that historically has been separated as a result of inaccessibility from other areas to the north and south. By contrast, the 1977 plan does not maintain any of these communities of interest; instead, it combines urban, surburban and rural areas

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[10]The Arlington City Council resolved that the city's representation would be diluted by the 1977 plan. (App. at 68).

into the same districts.[11]

Yet another deficiency in the 1977 plan is that of minority representation. That plan places the bulk of Mexican-American voters in a district which is 49.3% black and only 22.2% Mexican-American. *Graves v. Barnes*, 408 F. Supp. at 1052. The secondary minority district is 38.9% black and 3.6% Mexican-American. The 1976 plan effectively provides better representation for Mexican-Americans; its primary district is 60.3% black and 3.8% Mexican-American, its secondary district 25.28% black and 19.35% Mexican-American. *Graves v. Barnes*, 408 F. Supp. at 1052. Whereas a minority candidate could carry either district in the 1977 plan by appealing only to blacks, it is unlikely that he could do so in the secondary district of the 1976 plan. Furthermore, this district includes the primary area of Mexican-American growth in Tarrant County. District 32-F of the 1976 plan provides an opportunity for equal access to the election process for Mexican-Americans, Blacks and Anglos in the District because no candidate could

[11]An examination of the map of the 1977 plan quickly discloses this fact. (App. at 60). For example, District 32-F of that plan reaches from the outer boundaries of Tarrant County down to the very center of Fort Worth, needlessly including the numerous small communities and rural area of north Tarrant County with the urban core of the City of Fort Worth. Districts 32-G, 32-B, 32-I, and 32-G of the 1977 plan also have the same needless combination of urban, suburban and rural interest. However, no District is as extraordinary as District 32-C which reaches from the far north part of rural Tarrant County through the City of Fort Worth down to the southern boundary of the entire area and then extends by a narrow elongation out to reach the eastern boundary of the county. This elongation was added by Plaintiffs when their plan was changed at the last minute before the 1977 hearing and further shattered the community of interest previously recognized in the Resolution of the City Council of Arlington. (App. at 68).

prevail without appealing to an assortment of interests. The 1976 plan better provides for Mexican-American access to the election process than does the 1977 plan.

The 1976 plan has proven effective in providing representation of minorities. Under that plan the voters have elected one black representative and two anglo representatives, Ms. Miller and Mr. Willis, who are sensitive to minority interests and have strong minority support. Majority Opinion (App. at 13-15). After noting the strong support of minorities for Representative Miller, whose District 32-I is 15.2% minority, the majority below adopted a plan which pairs her with another incumbent in an essentially high-income, conservative district. Similarly, Representative Willis is transferred from an urban and working class district to a rural district. Representative Leonard Briscoe, a black representative, was shifted from a district of 64% minority to one of 44% minority. Thus in place of a plan which has proven effective for minority representation, the majority below adopted the 1977 plan, the effectiveness of which is speculative and apparently inferior.

The pairing of incumbents is the rule of the 1977 plan. Whereas the continuation of the 1976 plan would pair no incumbents, the 1977 plan would result in the pairing of six of the nine representatives of Tarrant County. The preservation of member-constituent relationships is a legitimate state policy which enhances the representation of the voters by preserving the seniority of their elected representatives. *See White v. Weiser, supra* at 791; *Gaffney v. Cummings, supra* at 754; *Taylor v. McKeithen*, 407 U.S. 191 (1972); *Burns v. Richardson*, 384 U.S. 73, 89 n. 16 (1966). The importance of this member-constituent relationship is particularly important when the members are ones elected from a single-member constituency. Thus the 1977 plan fails in

yet another respect to comply with state policy as reflected in House Bill 1097 and effectuated under the 1976 plan.

The majority acknowledges that adoption of the 1977 plan, after the 1976 plan has been utilized for all elections since February, 1976, will effect a disruption of the election process with resulting voter confusion, voter apathy and inconvenience to election officers. (App. at 21-22). The court discards these effects as only "pragmatic rationale" that do not demonstrate the merits of one proposal over another. Such a conclusion is startling in view of the recognized purpose of drawing legislative districts on the basis of population equality to assure each voter effective participation in the election process. Over a period of six months following the 1976 general election, officials of Tarrant County worked through a series of public meetings and other opportunities for public participation to redraw election precinct lines to comply with state law and to overcome the confusion occasioned by lines hastily drawn for 1976 elections after the court's 1976 decision. Adoption of a new plan will occasion further and needless district, precinct, polling place and voter registration changes and resulting voter confusion and apathy. The prospect of voter confusion for 1978 elections was substantial considering the limited time available for local officials to implement the 1977 plan prior to those elections. This immediate adverse impact was avoided when Mr. Justice Powell stayed the majority's 1977 order pending appeal. However, even the implementation of such changes in 1979 for 1980 elections will constitute an unnecessary intrusion into the state's election process with the prospect of resulting confusion and apathy among Tarrant County voters who would have been whipsawed between a variety of anticipated and actual election plans over the past seven years. What merit can be found in reducing an acceptable population deviation

figure among districts to a purportedly lower one when the practical result is to adversely impact the entire election process in a manner that disenfranchises the voters?

Once an apportionment plan is in effect, whether by legislative enactment or court order, and state officials implement it by drawing precincts, registering voters, designating polling places, selecting precinct officers and carrying out elections according to the plan, the state and political subdivisions have a legitimate interest in maintaining the plan and preventing further disruption of the election process by additional unnecessary intrusions by the federal courts. This is not to suggest that such an interest is sufficient to justify a denial of constitutional rights, but it is and must be an interest sufficient to prevent the vascillations of a federal court in the exercise of its equitable discretion. The 1976 plan was expressly held to be constitutional by all three of the judges of the court below. *Graves v. Barnes*, 408 F. Supp. 1050. It was imposed to assure minority access to the election process and has been found by all three judges to in fact accomplish that purpose. The majority's adoption of a new plan in 1977 and dismissal of the state's interest in the integrity of its election process as a "pragmatic rationale" unrelated to the merits of the plans being considered is a further indication of the majority's disregard for legitimate state goals and misapplication of its own "relativist approach" to judging the merits of the plans before it.

Accordingly, even were the 1976 plan not entitled to deference as the state plan, it should have been adopted by the lower court as that plan most closely conforming to legitimate state policies without involving substantial population deviations. The view of the majority below that the burden is on the state "to articulate clearly the relationship between the variance and the state policy

furthered" originates from another quote taken out of context from *Chapman*. The Court in *Chapman* was addressing the justification of a 20% deviation. To apply such a painstaking review to a plan with only a 7.7% deviation is to place an immense burden upon the state in order to avoid the total frustration of state policies at the hands of district courts acting not in pursuance of constitutional requirements, but only in the purported furtherance of guidelines laid down by this Court in its supervisory function. In all fairness to states which find themselves subject to the broad apportionment powers of the federal courts, the stringent requirement of *Chapman* must be kept in context and applied only to a "population deviation of that magnitude" and only where another plan is available which apparently demonstrates that obedience to state policy does not prevent "attaining a significantly lower population variance." *Id.* at 25.

Even under such an unjustified application of the extremely stringent review implemented by the majority below, the 1976 plan should have been adopted. The preservation of voting precinct lines clearly results in the population deviation in this case.[12] Furthermore, the fact that no plan has been constructed which adheres to state policy and offers a deviation lower than that proposed by the State is a clear indication that the policy leads to the minor deviation in this case. *Cf. Connor v. Finch, supra; Chapman v. Meier, supra.*

[12]*See* n. 8, *supra.*

III.

THE MAJORITY BELOW FAILED TO CONSIDER BASIC EQUITABLE PRINCIPLES AND THEREBY ERRED IN ADOPTING THE 1977 PLAN.

In its choice of the 1977 plan, the majority below did not even attempt to consider the equities involved. Ignoring its earlier holding that the 1976 plan was constitutional, *Graves v. Barnes*, 408 F. Supp. 1050, the majority felt that it was asked "to ignore constitutional norms in the name of convenience and administrative inertia." (App. at 22). Since the 7.7% deviation in the 1976 plan is clearly constitutional, the court below was asked only to adopt a plan which *may* entail a marginally higher deviation out of consideration for the equities involved.

> The courts are bound to apply equitable considerations and in *Reynolds* it was stated that '[i]n awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws . . . . *Ibid.*

Mahan v. Howell, supra at 332.

This is but an application of the general rules involving the propriety of injunctive relief. An injunction will issue "only . . . when both the right and the wrong claimed are clear . . . ," *Sharp v. Lucky*, 266 F.2d 342, 343 (5th Cir. 1959), and only after a

> . . . balancing of the interests of the parties who might be affected by the court's decision—the hardship on plaintiff if relief is denied as opposed to the hardship on defendant if it is granted . . . .

WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE, *Civil* §2942, p. 366-67. "There must be more than a mere possibility or fear that the injury will occur." *Id.* at 369.

The equities in this case are overwhelmingly against adoption of a new apportionment plan for Tarrant County. Initially, there is no assurance that the claimed deviations in the two plans are accurate; the 1976 plan may in fact provide lower deviations than the 1977 plan. The utility of 1970 population figures to compute 1978 deviations is limited. Even at the time a census is taken, "the 'population' of a legislative district is just not that knowable to be used for such refined judgments" as that between a 2% and 7.7% deviation. *Gaffney v. Cummings, supra* at 746. Furthermore, the total population "may not actually reflect that body of voters whose votes must be counted and weighed for purposes of reapportionment . . . ." *Id.* at 746. The matter "is complicated by the recognition that major shifts in population and in voting precinct lines have occurred since the 1970 census . . . ." *Connor v. Finch, supra* at 416, n. 13.[13] Finally, the majority's stringent application of the principle of population equality to the nine legislative districts in Tarrant County was in avoidance of the reality that the nine districts constitute only a small fraction of the 150 total state representative districts. Regardless of whether Tarrant County legislators are elected under the 1976 plan or 1977 plan, the people of Tarrant County will find themselves in districts with a population both greater and smaller than some of the other 141 state legislative districts.

[13]Similarly, the majority has recognized that population shifts since 1970 suggest that the deviation in the 1977 plan may be understated. *Graves v. Barnes*, 408 F. Supp. at 1053 n.7.

The majority below noted that insufficient evidence had been presented on the question of population to permit such refined judgments, *Graves v. Barnes*, 408 F. Supp. at 1053, but without the introduction of any further evidence[14] on the point proceeded two years later to make such a judgment. This action constituted an abuse of discretion for there was no clear showing of a wrong inflicted by the 1976 plan, much less the presentation of a "case reasonably free from doubt" upon which to base injunctive relief by a federal court against state officers. *Massachusetts State Grange v. Benton*, 272 U.S. 525, 527 (1926).

Although the lack of any clear advantages to the majority's decision is enough to require its reversal, that result is even more clearly mandated when the adverse effects upon the State are examined. As noted above, voter confusion and disenfranchisement are "severe problems occasioned for the citizens" of Tarrant county by the massacre of voting precincts and existing district lines. *Chapman v. Meier, supra* at 26. The member-constituent relationships would be destroyed. Pursuant to state law new election precincts would have to be drawn, new polling places established and many voters re-registered. *See Reynolds v. Sims, supra* at 585. The districts of the City Council of the City of Fort Worth and the Board of Trustees of the Fort Worth Independent School District would have to be reapportioned. Finally, adequate minority representation would be jeopardized and other legitimate state policies frustrated.

[14]Plaintiffs below did introduce a study intended to show certain population changes among certain census tracts in Tarrant County. The report was offered for purposes of showing the movement of minorities in Tarrant County and did not purport to show population increases or decreases even for the small area surveyed. The majority of the court below found that the report did not offer the high degree of accuracy required. Majority Opinion (App. at 16).

In exchange for this considerable expenditure of local tax money, the abundant confusion of the voting public, and the frustration of state policy, Tarrant County would have an apportionment plan for a maximum of three years[15] which cannot with any degree of certainty be said to reduce the population variation. This Court in *Connor v. Finch* and *Chapman v. Meier* could not have intended this result; otherwise every court ordered plan in the United States would be subject to challenge upon the development of one of supposedly lower population deviations. Such a persistent review of existing apportionment plans, including that by the majority below, conflict with this Court's holding in *Pasadena City Board of Education v. Spangler*, 427 U.S. 424 (1976).

> For having once implemented a racially neutral attendance pattern in order to remedy the perceived constitutional violations on the part of the defendants, the District Court had fully performed its function of providing the appropriate remedy. . . .

Id. at 436-37. There is no meaningful distinction in this context between the implementation of a redistricting plan for school attendance and one for legislative elections. In either instance the work of a federal court is completed when constitutional violations have been remedied. Since the 1976 plan constituted an adequate remedy, the "District Court had fully performed its function" and the majority below abused its discretion in attempting to exercise its equitable jurisdiction for further relief not required by the Constitution.

---

[15]Reapportionment will be necessary after the 1980 census. Tex. Const., art. III, §28; *See Reynolds v. Sims, supra.*

CONCLUSION

This case is one that has been before this Court before. On two prior occasions, Appellants have felt compelled to appeal from the reapportionment decision of the majority of the Court below. On each occasion this Court has heard our appeal. It is with reluctance that Appellants return to take the time of the United States Supreme Court and prolong the litigation. Until the majority of the court in its recent order struck down the existing single member district scheme for Tarrant County, it appeared that the seven year old controversy had finally been resolved. Now, however, for the reasons set out in this Jurisdictional Statement and in the dissenting opinion filed by Judge John H. Wood in the court below, and due to the majority's "perpetual unconstitutional intrusion in and usurpation of those democratic processes . . . reserved . . . to all of the sovereign States," (Wood, J., dissenting) (App. at 37), Appellants are compelled to appeal yet a third time from a decision of that majority. The case raises unique questions of law requiring answers by this Court.

WHEREFORE, PREMISES CONSIDERED, Appellants pray that this Honorable Court note probable jurisdiction of this case, reverse the decision of the majority below, and order the district court to enter the 1976 plan as the permanent apportionment of state representative districts for former multi-member district 32, or, in the alternative, that this Honorable Court note probable jurisdiction of this case and set it for argument and plenary consideration.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Steve Bickerstaff, a member of the Bar of the Supreme Court of the United States, do now enter my appearance in the Supreme Court of the United States in the above mentioned cause on behalf of the Appellants. I do hereby certify that three copies of the foregoing Jurisdictional Statement have been served by placing same in the United States Mail, First Class, Certified and Postage Prepaid, on this the 20th day of January, 1978, addressed to each of the following:

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Steve Bickerstaff

77-1033

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

* * *

NO. A-453

* * *

DOLPH BRISCOE, Governor of Texas and STEVEN C. OAKS, Secretary of State of the State of Texas

Petitioners

v.

FRANK ESCALANTE, FRANK MOORE, JOHN DILLARD, T. R. DILLARD, and MARY DILLARD

Respondents

* * *

APPENDIX TO JURISDICTIONAL STATEMENT

* * *

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1976 Memorandum Opinion (not reproduced herein because reported at *Graves v. Barnes*, 408 F.Supp. 1050 [1976].

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

FILED
FEB 19 1976
Dan W. Benedict, Clerk
BY
Deputy

CURTIS GRAVES, ET AL.	)(	
V.	)(	CIVIL ACTION NO. A-71-CA-142
BEN BARNES, ET AL.	)(	
DIANA REGESTER, ET AL	)(	
V.	)(	CIVIL ACTION NO. A-71-CA-143
BOB BULLOCK, ET AL.	)(	
JOHNNY MARRIOTT, ET AL.	)(	
V.	)(	CIVIL ACTION NO. A-71-CA-144
PRESTON SMITH, ET AL.	)(	
VAN HENRY ARCHER	)(	
V.	)(	CIVIL ACTION NO. A-71-CA-145
PRESTON SMITH, ET AL.	)(	

FRANK A. ESCALANTE, ET AL.	)(	
	)(	
	)(	
V.	)(	CIVIL ACTION NO.
	)(	A-73-CA-115
MARK WHITE, ET AL.	)(	
JAMES GASKIN, ET AL.	)(	
	)(	
V.	)(	CIVIL ACTION NO.
	)(	A-73-CA-146
MARK WHITE, ET AL.	)(	
WANDA L. CHAPMAN, ET AL.	)(	
	)(	
	)(	
V.	)(	CIVIL ACTION NO.
	)(	A-73-CA-155
MARK W. WHITE., JR., ET AL.	)(	
	)(	

ORDER

In June, 1975, the Supreme Court of the United States vacated the judgment of this Court and remanded the case for reconsideration as to whether the case is or will become moot in light of reapportionment legislation enacted by the 64th Texas Legislature. We find that House Bill 1097 cantains provisions establishing single-member districts for the previous multi-member districts 37, 72, 75 and 35. House Bill 1097 also

ostensibly eliminated the gerrymander which we formerly held to be unconstitutional in Districts 17 and 19.

House Bill 1097 contained provisions establishing single-member districts for the previous multi-member District 32. However, the Attorney General of the United States, acting under the Voting Rights Act, 42 U.S.C. 1973(c), *et seq.*, interposed objections to the implementation of House Bill 1097 with respect to Districts 32A through 32I, and those provisions are not in effect. Under the terms of the remand order of the United States Supreme Court, this action has not been rendered moot and represents a continuing controversy with respect to the legislative districts in Tarrant County encompassed with Districts 32A through I of House Bill 1097. The Court reaffirms its conclusion that the existing multi-member legislative District 32 represents an unconstitutional dimuntion of Plaintiffs' right to vote in violation of the Fourteenth and Fifteenth Amendments of the Constitution of the United States.

Therefore, it is ORDERED that:

(1) This civil action is moot and, therefore, is dismissed as to Districts 37, 35, 72, 75, 17 and 19;

(2) District 32 is hereby reapportioned into single-member representative districts in conformance with appended Exhibit A;

(3) Article III, Section 7, of the Constitution of the State of Texas, as it pertains to the one-year district residence for State Representatives, is hereby suspended for the 1976 primary and general elections for those candidates for the Texas House of Representatives from District 32; however, such candidates must have resided in the territory encompassed by the combined area of Districts 32A through 32I for the requisite period of

time provided by the Texas Constitution and law; and

(4) The filing deadline for legislative seats 32A through 32I is extended to March 8, 1976, at 6:00 p.m.; and

(5) The issue of attorneys' fees is reserved for later disposition by the Court.

SIGNED and ENTERED this 19th day of February, 1976.

S/S
CIRCUIT JUDGE

S/S
DISTRICT JUDGE

S/S
DISTRICT JUDGE

EXHIBIT A

32A. That part of Tarrant County included in census tracts 130, 131, 134.01, 134.02, 135.01, 135.02, 136.02, 137, 217.02, and 218, that part of census tract 65.05 East of the Handley-Ederville Road, and that part of census tract 136.01 included in census enumeration district 129 South of State Highway 121 and census block groups 3, 4, and 5.

32B. That part of Tarrant County included in census tracts 115.01, 115.02, 217.01, 219, 220, 221, 222, 223, 224,

225, 226, 227, 228, and 229.

32C. That part of Tarrant County included in census tracts 42.02, 54.01, 54.02, 55.01, 55.02, 55.03. 55.04, 56, 57.01, 57.02, 58, 59, 60.01, 60.02, 111.01, and 111,02, that part of census tract 47 South of Gambrell Street, that part of census tract 109 South of U.S. Highway 377 and South of Old Benbrook Road, and that part of census tract 110.02 North of Sycamore School Road.

32D. That part of Tarrant County included in census tracts 22, 23.01, 23.02, 24.01, 24.02, 25, 26, 27, 51, 52, 53, 106.01, 106.02, 107.01, and 107.02 and that part of census tract 109 North of U.S. Highway 377 and North of Old Benbrook Road.

32E. That part of Tarrant County included in census tracts 5.01, 6, 50.03, 66, 67, 101, 102, 104.01, 104.02, 105, 132.01, 138, 139, 140.01, 140.02, and that part of census tract 136.01, 138, 139, 140.01, 140.02, and that part of census tract 136.01 included in census enumeration districts 9A, 9B, 9C, 12, 14, 39, and 39B and that part of census enumeration district 129 North of State Highway 121, and that part of census tract 141 included in census enumeration district 47.

32F. That part of Tarrant County included in census tracts 1.01, 1.02, 2.01, 2.02, 3, 4, 8, 9, 10, 11, 12.02, 16, 17, 18, 32, 33, 34, 49, 50.01, 50.02, and that part of census tract 103 West of Haltom Road.

32G. That part of Tarrant County included in census tracts 12.01, 14.01, 14.02, 14.03, 15, 35, 65.01, 65.02, 65.03, 65.04, 132.02, 133.01, 133.02, 216.01, 216.02, 216.03, and that part of census tract 13 North of the Texas and Pacific Railway and that part of census tract 65.05 West of Handley-Ederville Road and that part of census tract 103 East of Haltom Road.

32H. That part of Tarrant County included in census tracts 36.01, 36.02, 37.01, 37.02, 38, 39, 45.01, 46.01, 46.02, 46.03, 46.04, 46.05, 61.01, 61.02, 62, 63, 64, and that part of census tract 13 South of the Texas and Pacific Railway and that part of census tract 45.02 East of Bryan Street.

32I. That part of Tarrant County included in census tracts 5.02, 7, 19, 20, 21, 28, 29, 30, 31, 40, 41, 42.01, 43, 44, 45.03, 48.01, 48.02, and that part of census tract 45.02 West of Bryan Street and that part of census tract 47 North of Gambrell Street.

BEFORE GOLDBERG, CIRCUIT JUDGE, and JUSTICE and WOOD, DISTRICT JUDGES. JUDGE WOOD, DISSENTING.

MEMORANDUM OPINION

PER CURIAM (GOLDBERG AND JUSTICE):

Because our selection of the current districting plan[1] for Tarrant County, Texas, in 1976 was guided in no small way by constraints of time and practicability,[2] we expressly retained jurisdiction to grant further relief if the plan proved inadequate to relieve the constitutional deprivations suffered by the minority communities of Tarrant County.[3] In response to the plaintiffs' motion, we made good our promise to reconvene and reconsider the propriety of the legislative districting plan adopted for the county, by convening a hearing of two days duration in September of 1977. We are now graced with a less coercive timetable and a somewhat fuller record upon which to consider the current status of the minorities in Tarrant County. Our earlier ruling was admittedly wrought of practicality; we now determine whether it may stand as a matter of principle.

* * *

Two substantive challenges are brought against the current districting plan for Tarrant County. First, it is claimed that the plan unconstitutionally dilutes the voting strength of the county's minority community and thereby denies minorities equal access to the electoral process. Oversaturation of minorities in one district, accompanied by a fragmentation and dispersal of the remaining minorities among other districts, allegedly accomplishes this dilution.

On a second, and essentially independent front,[4] the present plan is claimed to violate the Fourteenth Amendment's equal protection requirement that legislative districts by "as nearly or equal population as is practicable." *Reynolds* v. *Sims*, 377 U.S. 533, 577 (1963); *Chapman* v. *Meier*, 420 U.S. 1 (1975); *Conner* v. *Finch*, 45 U.S.L.W. 4528, ___U.S.___ (1977). Proof here partakes of a comparison between the plaintiffs' plan, with an absolute population deviation of less than 2%, and the plan now is effect, with a deviation factor of 7.7%.

Our consideration of these vexed questions is diverted by a preliminary issue regarding the scope of our review. Specifically, we are bound to determine whether the present plan is one deserving of indulgent review, by virtue of its purportedly legislative genesis,[5] or whether it must be held to those higher standards which pertain to districting plans that are the product of court order.[6] This, in turn, requires examination of "the thorny questions concerning the extent to which one plan might be deserving of some presumptive preference on the basis of its closer congruence to the legislatively drawn lines of H.B. 1097 [citations omitted]." *Graves* v. *Barnes*, *supra*, 408 F. Supp. at 1054, n.8. Also, because our earlier observation that neither plan enjoys legislative approval may no longer be

precisely accurate, *id.*, we must evaluate such legislative imprimatur as the current plan may carry.

That the provisions of House Bill 1097 are presently ineffective as law is beyond dispute.[7] Nevertheless, the defendants urge preference to their plan, emphasizing that it retains three districts unchanged from those drawn in House Bill 1097, and makes only minor changes in others.[8] This once-removed approximation of legislative intent is claimed to cloak the present plan with the mantle of state policy, thereby to lend it a preferred status over the plaintiffs' proposal.

Although it is an unlikely argument—to proclaim as virtue a kinship with that which was riddled with vice—we of course recognize our duty to respect state apportionment policy. *See, e.g., White v. Weiser*, 412 U.S. 783, 93 S.Ct. 2357, 37 L.Ed.2d 380 (1973); *Whitcomb* v. *Chavis*, 403 U.S. 124, 91 S.Ct. 1858, 29 L.Ed.2d 363 (1971). We perceive the similarity of this matter with the facts of *White* v. *Weiser*, *supra*, and, even as the district court there was required to give deference to state policy appearing in an unconstitutional legislative proposal, we correspondingly stand ready to honor such policy considerations as do not detract from Constitutional requirements. *Id.*, at 795. We expressly eschew any notion, however, that the present plan deserves that kind of deference that properly attaches to conventional apportionment legislation. The last redistricting proposal which might have laid claim to such preferential treatment was House Bill 1097; along with its rejection by the U.S. Attorney Genral went any legitimate basis for this court's relaxed security of the so-called "state" proposal.[9] It is, therefore, only to the extent that the present plan *demonstrates* a legitimate state policy that it enjoys that privileged review which might have been presumptively accorded its predecessor.

Since our adoption of the present plan in 1976, the Texas Legislature has convened and adjourned both a Regular and a special Session. Although neither session produced any bill relating to legislative reapportionment in Texas,[10] it is suggested by the defendants that a product of the Special Session lends some form of legislative sanction to the present plan. Specifically, it is argued that the passage of two Resolutions, one by the Texas House of Representatives,[11] and one by the Texas Senate,[12] demonstrates legislative approval of the current districting scheme. This occurrence, we are told, should weigh in favor of our continuing approval of the present districting plan.

We pretermit an extended discussion of these legislative Resolutions, since their infirmities are obvious. We recognize, of course, that "reapportionment is a complicated process," and that "[d]istricting has sharp political impact and inevitably political decisions must be made by those charged with the task," *White* v. *Weiser*, *supra*, 412 U.S. at 795-96. It is for that reason, certainly, that "reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court." *Chapman* v. *Meier*, *supra*, 420 U.S. at 27. But to suggest that the mere endorsement of the plan adopted by this court in any way meets the task that properly befalls the legislature is to subvert totally the logic of our traditional deference to legislative effort. That deference contemplates a studied and thoughtful approach to the process of legislative apportionment, whereby the resulting legislation may be presumed to embody the legitimate concerns of the general public. It plainly does not envision such an abnegation of the legislative function as is suggested here; so attenuated a claim to the common will can be accorded only limited solicitude.[13]

Regarding the claim of voting dilution in Tarrant

County, our previous comparison of the same two plans that are now before us led us to the following conclusion:

> The 1970 census data supplied to the court, as well as the testimony adduced at the recent hearing in this suit, does not demonstrate that either of the two plans is unconstitutiona. Both plans provide for a primary district in which minority voters constitute a clear majority. In the Escalante Plan, this district is 49.3% black and 22.2% Mexican American, while the defendants' primary district is 60.2% black and 3.8% Mexican American. In addition, each plan contains a secondary district with approximately 43% minority population. In the plaintiffs' plan, this district is 38.9% black and 3.6% Mexican American, while the defendants' equivalent district is 25.3% black and 18.2% Mexican American. An examination of each plan's tertiary and quartary minority districts adds little flesh to the bones of the foregoing observations. Each of the proposed plans represents a substantial improvement over the former multimember scheme with its attendant constitutional infirmities.

Graves v. *Barnes, supra, (Graves III)*, 408 F. Supp. at 1052-53.

Barring any new evidence on the issue of minority access, we are bound to our holding that the present plan is a constitutional one. Since that earlier writing, however, the 1976 election for members of the Texas House of Representatives was accomplished under the provisions of the present plan. According to plaintiffs, the result of that election provides new evidence of the dilution of minority access to the political process in Tarrant County. Further, the plaintiffs assert the

validity of a population survey prepared at their instance and introduced at trial.[14] The survey is claimed to show a changing demographic pattern in the primary minority district (District 32-H), which was created under the present districting scheme. This pattern of change purportedly results in an enhancement of minority population in District 32-H, culiminating in an oversaturation there, and a concomitant fragmentation of minority influence in the secondary and tertiary minority districts. In due course, we shall turn to a consideration of the plaintiffs' new evidence; but our immediate concern is with the level background against which the plaintiffs' proof must be viewed.

In order to sustain a claim of denial of minority access to the political process,

> [t]he plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.

White v. *Regester, supra*, 412 U.S. at 765-66. The Court of Appeals for the Fifth Circuit has recently emphasized those particular elements which the Supreme Court, in *White v. Regester*, had identified as probative of denial of access to the political process.

> Among these are: a history of oficial racial discrimination which touches the right of the minority to register and vote and to participate in the democratic process, 412, U.S. at 766, 93 S.Ct. 2332, 37 L.Ed.2d at 325, a historical pattern of a disproportionately low number of

minority group members being elected to the legislative body, *id.*, a lack of responsiveness on the part of elected officials to the needs of the minority community, 412 U.S. at 769, 93 S.Ct. 2332, 37 L.Ed.2d at 325-26; a depressed socioeconomic status which makes participation in community processes difficult, 412 U.S. at 768, 93 S.Ct. 2332, 37 L.Ed.2d at 325-26; and rules requiring a majority vote as a prerequisite to nomination, 412 U.S. at 766, 93 S.Ct. 2332, 37 L.Ed.2d at 324. While these standards were developed for use in situations involving multimember districts, they have equal application to redistricting schemes making use of singlemember districts, such as the plan presently before this court. *Robinson* v. *Commissioners Court*, 505 F.2d 674, at 678 (CA5, 1976);

Kirksey v. *Board of Supervisors of Hinds County, Mississippi, supra*, ___ F.2d ___ (5th Cir. 1977) *(en banc).*

The *Kirksey* court also acknowledged the Supreme Court's new emphasis upon "the interplay, in equal protection cases, between racially discriminatory intent and racially differential impact as criteria for violation of the equal protection clause." *Id.* at ___. Citing *Washington* v. *Davis*, 425 U.S. 229 (1976) and *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, ___ U.S. ___ (1977), and *assuming* their applicability to racial minorities' claims of exclusion from the democratic process, *Kirksey, supra*, at ___, the *en banc* panel nevertheless observed that "nothing in these cases suggests that, where purposeful and intentional discrimination already exists, it can be constitutionally perpetuated into the future by neutral official action." *Id.*, at ___. Accordingly, the *Kirksey*

court concluded that "[w]here a [districting] plan, though itself racially neutral, carries forward intentional and purposeful discriminatory denial of access that is already in effect, it is not constitutional." *Id.*, at ___.

It is proposed by no one that we re-open our inquiry regarding the political and racial history of Tarrant County under its previous muti-member plan. We therefore adhere to our earlier finding that that plan worked "unconstitutionally to 'cancel and minimize' minority voting strength according to the standards in *White* v. *Regester, supra, Zimmer* v. *McKeithen, supra,* and *Turner* v. *McKeithen, supra.*" *Graves* v. *Barnes, supra,* 378 F. Supp. at 648. Our present inquiry is whether the current plan, effectuated in 1976, perpetuated an existent denial of access by the racial minority to the political process. *Kirksey, supra,* ___ F.2d at ___. It is in this limited context, and in the light of the *Kirksey* decision, that we consider plaintiffs' claimed new evidence of dilution.

As already mentioned, the Primary and General Elections of 1976 were carried out under the plan now in effect for Tarrant County. Five persons, all black, filed for the Democratic nomination for State Representative in the primary minority district, 32-H. No filing was made for the Republican nomination. Candidates Leonard Briscoe and Bobby Webber obtained run-off positions against the three other blacks. Briscoe was subsequently certified as the Democratic nominee, and was later elected as the State Representative of District 32-H.[15]

In District 32-F, the secondary minority district, the incumbent Anglo, Doyle Willis, was the only person to file for the Democratic nomination. There was no filing for the Republican nomination, and Willis was duly

elected State Representative from District 32-H.[16] The tertiary minority district, 32-I, elected as it's Representative an Anglo, Ms. Chris Miller. These election results, and in particular their perceived meaning by the minority community, bear close scrutiny.

The election of a black representative from District 32-H, with a minority population of sixty-five percent, was a predictable result of the present districting scheme. No longer can it be said, as was true in 1974, that few blacks had ever sought, and none had ever won a legislative seat from Tarrant County District 32. *See, e.g., Graves* v. *Barnes (Graves II), supra,* 378 F. Supp. at 645. Nor could it today be said—if numerical proportionality our sole concern—that minority access in Tarrant County is still at its arithmetical nadir. But we cannot be satisfied with this measure alone.

> Were we to hold that minority candidate's success at the polls in conclusive proof of a minority group's access to the political process, we would merely be inviting attempts to circumvent the Constitution. This we choose not to do. Instead, we shall continue to require an independent consideration of the record.

Kirksey v *Board of Supervisors of Hinds County, Mississippi, supra,* ___ f.2d at ___n. 21.

So far as the record before us pertains to the totality of representation accorded the minority community, and to the extent that the perceived responsiveness of elected representatives may offer some index of minority access to the decision-making process, *see, e.g., Zimmer* v. *McKeithen, supra,* 485 F.2d at 1305, we can only conclude that the minority interests of Tarrant County today enjoy an equal opportunity "to participate in the political processes and to elect legislators of their

choice." *White v. Regester, supra,* 412 U.S. at 766. Just as we do not overestimate the significance of the election of a black representative, we also appreciate the possibility that minority interests may be fostered by representatives who are of non-minority status. Indeed, the record before us demonstrates that effective representation is not a function of ethnicity alone.

In District 32-F, with a minority population of approximately forty-four percent, Representative Willis ran unopposed in both the Democratic primary and the 1976 general election. In three prior elections, when he was twice opposed by black Republican candidates, and once by a black Democratic candidate, Representative Willis carried the black precinct of Tarrant County by considerable majorities.[17] These results evidence Representative Willis' continuing support in the minority community. Even more probative, we believe, is the generally favorable review of Representative Willis' performance by the plaintiffs' own witnesses.[18]

No less enthusiastic was the testimony in support of Representative Miller, whose District 32-I embraces a 15.23% minority population.[19] It was Miller who, in 1975, introduced the plaintiffs' plan as a redistricting measure in the Texas Legislature.[20] We further note that Miller's election in 1976 was in part attributable to the strong support of the minority precincts in District 32-I.[21] Upon these facts, we can only conclude that the present plan operates effectively to remedy the pre-existent denial of access by the racial minority to the political process in Tarrant County. We perceive no basis in the results of the 1976 election to question our earlier finding that the current districting plan is not constitutionally infirm.

Our belief that the plan is not racially discriminatory

survives also the report prepared by Dr. Tom Marshall and tendered in evidence by the plaintiffs. The effect of Dr. Marshall's report, if accurate, is to show that, since 1970, a movement of black population into previously all-white areas of southeastern Fort Worth has occurred, with the result that the minority population of District 32-H has climbed far above the sixty-five percent figure shown by the 1970 census.[22] This claimed oversaturation of minorities in District 32-H provides, of course, the basis for the plaintiffs' claim of fragmentation and voting dilution in the remaining minority districts, 32-F and 32-I.

Were we to accept as accurate the proposed revision of population figures for District 32-H, we might still be hard put to conclude that the existing plan accounts for a denial of minority access. "[C]learly it is not enough to prove mere disparity between the number of minority residents and the number of minority representatives." *Kirksey, supra*, at ___, citing *Zimmer* v. *McKeithen*, 485 F.2d 1297 at 1305 (5th Cir. 1973) *(en banc), aff-d on other grounds sub nom. East Carroll Parish School Board* v. *Marshall*, 424 U.S. 636, 96 S.Ct. 1083, 47 L.Ed.2d 206 (1976). Nor have we yet reached the position where minority votes may be said to be diluted merely because their effect is not maximized. *See City of Richmond* v. *United States*, ___U.S.___ (19___).

But it is for a different, and more fundamental reason that we are unable to accord significance to this element of the plaintiffs' new proof. Our examination of the Marshall study persuades us that its projections simply do not offer that "high degree of accuracy" required to supplant the population figures of the prior decennial census. *Kirkpatrick v. Preisler*, 394 U.S. 526, 535 (1969); *see also, Dixon* v. *Hassler*, 412 F. Supp. 1036 (W.D. Tenn. 1976), *aff'd sub nom. Republican Party of Sheldon County Tennessee v. Dixon*, 429 U.S. 934 (1974).

Among the several scientific defects which the report is said to suffer,[23] we note in particular the incongruity of combining 1970 total population figures with 1977 data on ethnic composition. In our view, the resulting calculation of ethnic ratio changes is necessarily skewed; certainly the product is not the "careful and substantial demographic analysis" upon which we might question the current legitimacy of the 1970 census figures. *Graves* v. *Barnes, supra*, 408 F. Supp. at 1053. We are therefore constrained to find that the present plan is a constitutional one, in the sense that it does not perpetuate a pre-existent denial of minority access to the political process. *Kirksey, supra.*

* * *

When the present plan was implemented, in 1976, we reserved the question "[w]hether the 7.7% deviation in the defendant's plan is objectional [sic] under the *Chapman* standard . . ." *Graves* v. *Barnes, (Graves, III), supra*, 408 F. Supp. at 1053. In *Chapman* v. *Meier*, 420 U.S. 1, 95 S.Ct. 751, 42 L.Ed.2d 766 (1975), to which we referred, the following language appears:

> We hold today that unless there are persuasive justifications, a court-ordered reapportionment plan of a state legislature must avoid use of multimember districts, and, as well, must ordinarily achieve the goal of population equality with little more than *de minimis* variation. Where important and significant state considerations rationally mandate departure from these standards, it is the reapportioning court's responsibility to articulate precisely why a plan of single member districts with minimal population variance cannot be adopted.

Id., 420 U.S. at 26.

We found in the exigencies of time sufficient justification for the higher deviation in the state's plan, *Graves* v. *Barnes (Graves III)*, *supra*, 408 F. Supp. at 1053, and we therefore postponed to another day "[t]he troublesome question . . . whether *Chapman* significantly modifies the *Mahan* standard [for legislatively-crafted plans] in relation to court-ordered plans." *Id.*, n. 7. The day of reckoning having arrived, we now contemplate the issue of population deviation.

The equal protection clause requires that legislative districts be of nearly equal population, so that each person's vote may be given equal weight in the election of representatives. *Reynolds* v. *Sims*, 377 U.S. 533 (1964). Minor deviations from mathematical equality among state legislative districts are insufficient to make out a prima facie case of invidious discrimination so as to require justification. *Gaffney* v. *Cummings*, 412 U.S. 735 (1973). In the case of *legislatively* enacted plans, that rule accounts for a threshhold of approximately ten percent, below which maximum population deviations are deemed to be of prima facia constitutional validity. *See Gaffney* v. *Cummings*, *supra*, 412 U.S. at ___; *White* v. *Regester*, 412 U.S. 755. The precise *de minimis* threshhold for *court-ordered* plans is less certain, but is plainly lower than that afforded legislative apportionments. *Chapman* v. *Meier*, 420 U.S. 1 (1975). In the process of giving static scrutiny to a court-ordered plan, the Supreme Court has refused to assume the validity of even a 5.9%. deviation. *Id. See also, Conner* v. *Finch*, *supra*, 45 U.S.L.W. at 4530, n. 27.

In its most recent writing on the topic of legislative apportionment, *Conner* v. *Finch*, *supra*, the Supreme Court held that a Mississippi District Court abused its equitable discretion in fashioning a reapportionment

plan which resulted in absolute population deviations of 16.5% in Senate districts and 19.3% in House districts. To be sure, these aggravated population disparties would have offended even the guidelines for legislatively crafted apportionments, and therefore tell us little about the current status of the *de minimis* rule as a purely mathematical proposition. But the new guidance we gain from *Conner* is that considerations of state policy that result in a statistically offensive plan "cannot be viewed as controlling and persuasive when other, less statistically offensive, plans already devised are feasible [citations omitted]." *Conner*, *supra*, 45 U.S.L.W. at 4531. Confronted, as we are, with two proposals of measurably different deviation, we proceed under the Court's new relativist approach, and compare the efficacy of each in accomplishing legitimate state policy. Further, believing that the disparties in population here shown approach, if they do not occupy, the borderline of judicially proscribed deviations, we are propelled onto the road of equitable discretion.

One of the state policies purportedly served by the configuration of the districts in the present plan is the maintenance of the integrity of political subdivision lines. That the preservation of such boundaries is a legitimate state goal we readily acknowledge. *Mahan* v. *Howell*, 410 U.S. 315, 329 (1973); *Swann* v. *Adams*, 395 U.S. 440 (1967). We are, however, considerably less certain that this policy is better accomplished in the present than the proposed plan. The record indicates that the present plan transcends city boundaries no less than thirty-four times, carving Haltom City into three districts, and Arlington into four. The plaintiffs' plan interrupts city coundaries slightly *fewer* times.[24] If there exists a state policy of respecting political boundaries, it is certainly no better served by the present plan than by that which is proposed in its stead.

A second policy said to be served under the present plan is maintaining identifiable communities of interest. This, too, we believe to be a legitimate state goal, *see, e.g., Chapman* v. *Meier, supra*, although, in the instant case, it is far from apparent that the alleged communities of interest account for the higher absolute deviation inherent in the state's plan. So far as the record offers any guidance here—and it does not offer much—we observe no basis for concluding that the present plan is superior to the proposed one. Instead, we find utterly conflicting evidence regarding even those interests which may be said to be communal. For example, a resolution passed by the City Council of Arlington entreats this court to approve the present plan for its recognition of the common interest of the City of Arlington and contiguous cities. This, in the face of a districting scheme that parcels the City of Arlington into four separate districts. If there is policy at work here, we fail to preceive it.

We are troubled, too, by the rather loose and ill-defined characterization of community interest that supposedly underlay House Bill 1097, and, by reference, the current plan. The footnoted colloquy between plaintiffs' counsel and Representative Tom Schieffer, author of the current plan, is illustrative.[25]

We do not find in the record the slightest suggestion of those interests, other than geography, which might join these "communities". Indeed, we might as readily observe that the commonality of interest among these regions goes no further than their placement within the same legislative district. Without more than this conclusory claim to legislative intent, we are not persuaded that this element of state policy in any way palliates a population variance of 7.7%.

The creation of compact representative districts

constitutes a legitimate state objective. That the present plan more closely approximates this goal is evident.[26] But it is equally apparent that the record contains no evidence that the plan's higher deviation factor is the result of an effort at compaction. We understand the law of reapportionment to permit a trade-off between the competing aims of state policy and population equality. Where legitimate state policy can be accomplished only at the expense of population equality, then an otherwise intolerable degree of deviation may become acceptable. But it is not enough to demonstrate merely that a plan of higher deviation *may happen* to accomplish certain policy goals; rather, the burden upon the proponent of such a plan is "to articulate clearly the relationship between the variance and the state policy furthered." *Chapman, supra*, 412 U.S. at 22.[27]

It is this fundamental failure of proof, under both *Chapman* and *Conner*, which vitiates the defendants' other state policy claims as well. We accept the proposition that the maintenance of existing member-constituent relationships is a justifiable state policy, *see White* v. *Weiser, supra*, 412 U.S. at 791, and that it is well-served under the present plan. But we do not understand that this goal can be accomplished only at the expense of so high a deviation from the population norm. This element of state policy has not been, under *Chapman*, "explicitly shown to necessitate the substantial deviation embraced by the plan." *Chapman* v. *Meier, supra*, 420 U.S. at ___. We therefore cannot endorse a plan that accomplishes, however fully, this limited objective. *See, e.g., Robinson v. Commissioners Court, Anderson County*, 505 F.2d 674, 680 (5th Cir. 1974).[28]

Finally, we are urged, both as a matter of policy and equity, to consider that continued adherence to the present plan will have the effect of avoiding voter

confusion and encouraging voter participation. Another change in the districting of Tarrant County, it is claimed, will work a distruption upon the election process, and will operate to the substantial inconvenience of those county officials responsible for implementing any electoral changes. With all of these assertions we cannot disagree. But we do not conclude that these arguments demonstrate the merits of one proposal over the other; they suggest, instead, the same pragmatic rationale for decision that permitted only provisional relief once before.

It will ultimately serve no one for us to ignore constitutional norms in the name of convenience and administrative inertia. "[A] District Court should not, in the name of state policy, refrain from providing remedies fully adequate to redress constitutional violations which have been adjudicated and must be rectified." *White* v. *Weiser*, *supra*, 412 U.S. at ___. Our conclusion today is that the present scheme of districting in Tarrant County produces greater population disparities than necessary to effectuate any coherent and legitimate state policy. We accordingly adopt that plan which is, if at all, only marginally less effective in implementing identifiable state interests, and which comes significantly closer to achieving the goal of equal apportionment. This result we believe to be obligatory, both as a matter of constitutional principle, and as the product of the exercise of our equitable discretion. We therefore find that the plaintiffs' proposed plan for legislative redistricting in Tarrant County District 32 should be put into effect.

It will be so ORDERED.

S/S

Irving L. Goldberg
U. S. Circuit Judge
Fifth Judicial Circuit

S/S

William Wayne Justice
U. S. District Judge
Eastern District of Texas

Date: October 31, 1977

WOOD, District Judge, DISSENTS.

Footnotes

[1]See *Graves* v. Barnes (Graves III), 408 F. Supp. 1050 (W.D. Tex. 1976 (3-judge court). Reference to this earlier opinion will reflect, in pertinent part, the history of this protracted litigation. See also, *Graves* v. *Barnes (Graves I)*, 343 F. Supp. 704 (W.D. Tex. 1972); *Graves* v. *Barnes (Graves II)*, 378 F. Supp. 640 (W.D. Tex. 1973).

[2]*Graves* v. *Barnes*, *supra*, 408 F. Supp. at 1054.

[3]Those findings regarding the existence and extent of racial discrimination and dilution of minority access to the political process appear in *Graves* v. *Barnes*, supra, 378 F. Supp. at 644-48 (W.D. Tex. 1974).

[4]Our courts have acknowledged the occasional incompatibility of the two types of claims pursued here. Thus, it is said that ". . . redistricting done to comply with one-man, one-vote requirements may impinge upon the right of members of minorities to legal access to the processes of democracy." *Kirksey* v. *Board of Supervisors of Hinds County, Mississippi*, ___F.2d___ (5th Cir. 1977) *(en banc)*.

[5]Regarding the short and unhappy life of the Texas Legislature's last redistricting effort, as embodied in House Bill 1097, see, *Graves* v. *Barnes (Graves III)*, *supra*, 408 F. Supp. at 1051-52.

[6]See, generally, *Chapman* v. *Meier*, 420 U.S. 1 (1975).

[7]See note 5, *supra*.

[8]Pre-trial Order Stipulation No. 20.

[9]That we do not here confront a true legislative plan was admitted by counsel for the State of Texas in our previous hearing:

> It is the State's opinion, as the Judges have pointed out here, that surely [the proposed plan] is not a legislative plan. It is a plan proposed by the State which we believe we have a duty to do.

Transcript of 1976 hearing at 163.

[10]Pre-trial Order, Stipulations Nos. 5 and 6.

[11]House Simple Resolution, First Called Session, 65th Legislature. The full text of this resolution appears in our Appendix.

[12]Senate Resolution No. 2, First Called Session, 65th Legislature. The text of this resolution is identical to that adopted by the House of Representatives.

[13]Certainly we are not much comforted by the extent of deliberation which appears to have accompanied these measures. The record suggests, for example, that the attention given House Simple Resolution No. 2 consumed no more than one or two hours.

[14]Plaintiffs' Exhibit No. 2-77.

[15]Pre-trial Order, Stipulation Nos. 8, 10, and 19.

[16]Pre-trial Order, Stipulation No. 9.

[17]Transcript of 1977 hearing at 371. We note, however that one opponent was a Republican, and one was generally perceived to be of unstable mental capacity. *Id.*

[18]Transcript of 1977 hearing at 355, 485.

[19]Transcript of 1977 hearing at 485, 533.

[20]Transcript of 1977 hearing at 687.

[21]Transcript of 1977 hearing at 657.

[22]Transcript of 1977 hearing at 430. According to the Marshall Report, the present minority population figure is in the area of 82%.

[23]See, generally, Transcript of 1977 hearing at 586-92, testimony of Dr. Del Taeble; see also Transcript of 1977 hearing at 1204, deposition of Dr. Dudley L. Poston, Jr.

[24]Transcript of 1977 hearing at 464-65.

[25]Q. Now, then, communities of interest, would you tell the Court what communities of interest were preserved under your plan that existed in 1097?

A. Well, I think in—obviously, in Districts A. B. C and D the communities of interest were preserved in toto.

Q. Can you tell me what they are?

A. Well, in A it was to provide a district, growth district in Hurst, Euless, Bedford and around in there.
B was to give the City of Arlington a representative.
C was to give a district to the south side, lower south side.
D was to give the west side of Forth Worth a representative.
In District E, what is District E, that had been primarily a rural suburban district made up of small communities, and I think that that was the primary consideration in drawing it, and in the revised plan it was made even more so because I think only one tract of the City of Forth Worth exists in E.
In F, F, [sic] H and I, the core districts, I think under the compromise were—were made in almost all the City of Fort Worth representing the inner city.
In G, that's the east side of Fort Worth and the west side of Arlington. I think—I can't remember whether it was Richland Hills or North Richland Hills, that area above Fort Worth.

Transcript of 1977 hearing, at 836-37.

[26]Defendant's Exhibit Y.

[27]It is on this element of proof that the existence of a less statistically offensive plan is so probative. Plainly, the existence of an alternative plan that is as efficacious in state policy terms, and less offensive in terms of deviation, destroys and claim that the furtherance of state policy *necessitates* the higher deviation.

[28]We do not ignore the defendant's suggestion that, by virtue of a single shift in census tracts, the population variance might be reduced to 5.8%. Transcript of 1977 Hearing at 671; Defendant's Exhibit 77-X. We simply believe the higher deviation figure to be without sufficient policy justification. Indeed, the fact that the defendant's proposed variance can be so easily reduced only confirms the absence of any rational connection between the dictates of state policy and the configurations of the present plan.

JOHN H. WOOD, JR., UNITED STATES DISTRICT JUDGE, DISSENTING:

Forewarned by other Supreme Court reversals of the majority in this very case, but still undaunted, this Court again sallies forth into the political thicket on another legislative reapportionment expedition. Again, the majority in this, its latest Opinions, without rhyme, reason, logic, foundation, fact or judicial precedent, has maneuvered an absolutely 180 degree about-face and has completely and totally reversed its earlier decision in this case approving the original State's Plan under which the last Texas legislative elections were conducted. This erratic and inconsistent vascillation in this case, which has been before the Supreme Court for over six years, constitutes another unconstitutional usurpation of the rights of the sovereign State of Texas. The only lame argument made for this reversal by my colleagues is that they doubt that the State plan, which up to this time has been the Court's approved plan, is in fact really a State plan since it may not have the imprimatur of the State and particularly the Texas Legislature.

When this Court adopted the State's plan instead of the plaintiffs' plan on February 19, 1976, the State's plan did not have at that time the imprimatur of the State Legislature and other branches of the Texas government that it now enjoys.[1] After H.B. 1097 was enacted voluntarily in 1975 by the Texas Legislature which eliminated all multimember districts in the State after the Supreme Court had granted its Petition for Certiorari and after the Supreme Court had recertified this case back to this Court for us to decide if this State action had rendered this case "moot", the State of Texas submitted House Bill 1097 for clearance under Section 5 of Voting Rights Act to the Attorney General of the United States. By letter of January 23, 1976, the United

States Attorney General interposed objections to the single-member district lines of three of the districts contained in House Bill 1097, including District 32 of Tarrant County which is involved here.

Therefore, this Court reconvened on February 9, 1976, only a short time before the April 3, 1976 elections, to consider the three remaining districts. Two of the districts were resolved by agreed Order of the parties. No compromise was reached with regard to Tarrant County. However, the State did come forward with the proposal which was adopted by the Court on February 19, 1976 and thus this Court rejected the plaintiffs' proposed plan which the majority now prefers.

The present State plan which is now under attack before this Court was originally prepared by State Representative Tom Schieffer and was endorsed by the 1976 Tarrant County legislative delegation. It was presented to this Court as the State's Plan by the Texas Governor and Attorney General.

On February 19, 1976, as stated, this Court adopted the State's proposed plan as amended by the Tarrant County legislative delegations as its own single-member district plan for District 32 in Tarrant County and thereafter the plaintiffs appealed this ruling to the Supreme Court and sought to stay the Judgment of the District Court. Mr. Justice Lewis F. Powell referred the plaintiffs' appeal to the full Supreme Court on March 1, 1976 and the action of this Court was in all things affirmed.

Thereafter, under such plan, the 1976 elections in Texas were conducted under the Reapportionment Plan adopted by this Court and approved by the Supreme Court.

It is obvious, therefore, that when this Court adopted

the State's plan on February 19, 1976 (that is now in existence as the Court approved plan), the State's plan did not have the formal approval of the State Legislature and other branches of government, as well as the other local subdivisions of government in Tarrant County with which the existing plan is now endowed as will be demonstrated later. While the Court had some reservation in 1976 as to whether or not this plan had the imprimatur of the State of Texas, particularly that of the Legislature, this plan was adopted by this Court as one intended by the State to eliminate any possible constitutional infirmities that had heretofore been raised by the plaintiffs or the Attorney General of the United States and this Court agreed, in adopting this plan as its own, in the following language on February 19, 1976:

> "The 1970 Census data supplied to the Court as well as the testimony adduced at the recent hearing in this suit, *DOES NOT DEMONSTRATE THAT EITHER OF THE TWO PLANS (I.E., SUBMITTED BY PLAINTIFFS AND DEFENDANT RESPECTIVELY IS UNCONSTITUTIONAL.* Both plans provide for a primary district in which minority voters constitute a clear majority." (Emphasis added.)[2]

Not only does the State Plan which was adopted as the Court Plan in our earlier decision now have the State's legislative and executive imprimatur, but also enjoys the stamp of approval of all the democratically elected City Council and other local governmental bodies within the County of Tarrant as well as the imprimatur of this Court and the Supreme Court. This is the present existing plan upon which the State of Texas and its local subdivisions have relied in preparing voting lists, precinct lines and in making expensive preparations to

carry out a plan that this Court has heretofore held "did not possess any constitutional infirmities".[3]

The majority gives lip service endeavoring to ascertain State policy and legislative intent of the State as follows:

> "We, of course, recognize our duty to respect state apportionment policy. *See, e.g., White v. Weiser*, 412 U.S. 783, 93 S. Ct., 2357, 37 L.Ed.2d 380 (1973); *Whitcomb v. Chavis*, 403 U.S. 124, 91 S. Ct. 1858, 29 L.Ed.2d 363 (1971)."

It takes but the most cursory reading of the majority's Opinions and findings to determine that its duty with regard to respecting State apportionment policy has been totally and absolutely ignored.

Even if we follow the majority's erroneous finding that the defendants' plan is not a legislatively adopted or State approved plan and microscopically examine the two plans for indications of State policy and legislative intent, we must conclude that defendants have established the existence of identifiable and legitimate State goals and the closer congruence of the present plan to those goals. Since the present representatives were elected from the existing districts, final adoption of the present plan avoids pairing any representatives and maintains existing member-constituent relationships. Minimizing contests between incumbents is acceptable State policy. See *White v. Weiser*, supra; *Gaffney v. Cummings*, 412 U.S. 735 (1973); *Taylor v. McKeithen*, 407 U.S. 191 (1972); *Burns v. Richardson*, 384 U.S. 73, 89 n. 16 (1966). Plaintiffs' plan would pair six of the nine representatives.

The majority ironically states that because its selection of the current districting plan for Tarrant County, Texas which was adopted in 1976 by this Court

was "guided in no small way by constraints of time and practicability" it was an inconvenience to the political subdivisions of the State charged with conducting the elections for the Texas Legislature. The majority ignores the undisputed trial facts that these same conditions persist and are even worse at this time. The Court overlooks the evidence that the adoption of the plaintiffs' plan would affect the integrity of over seventy precincts in Tarrant County, while retaining the present Court plan would not cause any additional precinct changes. The voting precincts are, of course, the smallest political subdivisions with which voters identify.

The United States Supreme Court recently has asknowledged the possibility of using precincts to draw legislative districts. *Connor v. Finch*, ___U.S.___, 97 S. Ct. 1828, 1838 (1977). Adoption of plaintiffs' plan also would affect the integrity of the single-member district lines now existing in the City of Forth Worth. The preservation of political subdivision lines and historical boundaries has long been acknowledged by the Supreme Court as a rational and legitimate State goal. *Mahan v. Howell*, 410 U.S. 315, 329 (1973); *Swann v. Adams*, 385 U.S. 440 (1967); *Reynolds v. Sims*, 377 U.S. 533, 578-79 (1964).

The evidence further establishes that the adoption of plaintiffs' plan would make it virtually impossible for Tarrant County to comply with certain requirements of State election laws. Although the spring 1978 elections could probably be carried out on schedule, such a result could not be accomplished without great difficulty. A Court should not require precipitate changes that could make embarrassing demands on State election machinery. See *Reynolds v. Sims, supra.* Maintenance of the integrity of State election laws and their requirements certainly are legitimate State interests that would be served by permanent adoption of the

present Court plan.

Defendants established that considerable voter confusion followed implementation of a single-member district lines in Tarrant County as a result of the 1976 Order of this Court. Precincts with over the 3,000 voter limit established by State law were commonplace. Long lines at polling places resulted. Some voters were simultaneously registered in more than one precinct. Some candidates for election offices actually filed in the wrong precincts. The resolutions of the City Council of the City of Arlington and the Tarrant County Mayors' Council both cite the probability of more voter confusion and voter disenchantment on adoption of plaintiffs' plan as a reason for this Court to retain its present plan.

Now, single-member districts are in place under our previous Court adopted plan and Tarrant County has taken care during the past year to eliminate the over-large precincts and to reduce the voter confusion that occured last year on implementation of those districts. Avoiding voter confusion and encouraging voter participation is a legitimate State goal and retaining existing districts to avoid extreme disruption of the election process is acceptable. See *Chapman v. Meier*, 407 F. Supp. 649, 653 (D.N.D. 1975) on remand from 420 U.S. 1 (1975).

While I concur in the majority's rejection of the plaintiffs' claim that the State's Plan unconstitutionally dilutes the voting strength of the County's minority community and thereby denies minorities equal access to the electoral process, I strenuously disagree with the holding of the majority that the present State's Plan, which is now the adopted plan of the Court, violates the Fourteenth Amendment's equal protection requirement that legislative districts be "as nearly or equal population as is practicable".

Apparently, the majority is basing its decision as to the second point on the proposition that the present plan is not in fact the State Plan and that since "reapportionment is primarily the duty and responsibility of the State through its legislative or other body" the "mere endorsement of the plan adopted by this Court is insufficient to cause this Court to defer to such legislative effort" and states:

> "That deference contemplates a studied and thoughtful approach to the process of legislative apportionment, whereby the resulting legislation may be presumed to embody the legitimate concern of the general public."

This is incredible reasoning. To what extent must the Federal Courts police the minutes, the hours, the days and time that the legislative bodies spend in fashioning a redistricting legislative plan for Tarrant County which is merely one of 254 in the State of Texas?

It is true that after this Court adopted the State Plan in 1976 the Texas Legislature did meet and adjourn without introducing or passing any new redistricting lines for Tarrant County. The majority criticizes this absence of legislative action which I respectfully submit is totally unwarranted. If in our 1976 Order we had in fact instructed the Legislature to enact legislation, or even if we had suggested that it do so (and the Federal Courts are required to give the respective States every opportunity to correct their alleged mistakes[4]) there is little doubt that the State would have complied with such suggestion as it has always in the past. However, in view of this Court's 1976 Order adopting the Plan of the State of Texas and providing for further hearings only if the Plan failed to remedy constitutional deprivations

suffered by minorities, the Legislature's lack of action must be viewed as approval *sub silento* of the Court adopted plan. Of course, if the State were displeased with the present Court adopted plan, the State could have passed legislation establishing new districts. Finally, thereafter though, as heretofore observed, whatever doubt might have existed previously as to the State's legislative intent, it was clearly dispelled by the adoption of two separate resolutions of the Texas Legislature, one by the Texas House of Representatives and another by the Texas Senate, expressly setting forth State policy embodied in the defendants' plan which the Court had previously adopted as its own. This is conclusive of the State's legislative intent, especially where the resolutions specifically prescribed the districts presently existing in Tarrant County.

Plaintiffs' response to the onslaught of evidence of legislative intent, State goals and policy offered by the defendants is twofold. First, they suggest that the existence of H.B. 1097, as amended, House Resolution No. 3 and Senate Resolution No. 2 (resolutions adopting the present Court plan as that of the Texas Legislature), the Resolution of the Tarrant County Mayors' Council, consisting of all 31 Mayors from 31 cities in Tarrant County, the Commissioners of the County of Tarrant and the Resolutions of the Forth Worth and Arlington City Councils should be ignored because they are all the result of malignant motives or ill-consideration. Plaintiffs are, in effect, asking this Court to conclude that all of the elected State Representatives, State Senators, Mayors and County Commissioners in Tarrant County as well as members of the Arlington City Council are guided in their official acts in petitioning this Court for approval of the present Court adopted plan by motives of discrimination or are in the habit of adopting official resolutions or acts without appropriate study, conception or consideration. I refuse

to make such an outrageous assumption and I respectfully submit further that the endorsement by all of these bodies who are vitally concerned with this reapportionment problem refutes the contention of the majority that there was a failure to conduct "a studied and thoughtful approach to the process of legislative apportionment". Second, plaintiffs suggest, and apparently the majority agrees, that this Court is not required to pay any heed to such clear legislative intent and mandate.

In urging this result, plaintiffs and the majority seem to rely on a somewhat similar passage in *Wallace v. House*, 538 F. 2d 1138 (5th Cir., 1976). This case has no applicability to this "single-member" reapportionment case involved here since the complete passage in that case is that "the Court may pay no heed to legislative preference *FOR* AT-LARGE DISTRICTS", (which are no longer involved here), *id.* at page 1140 (Emphasis added.) *See also East Carrol Parish School Board v. Marshall.*[5]

In *Graves v. Barnes No. 1, supra*, my colleagues in this very case also criticized the entire State's plan in 1971 because it was allegedly not a product of legislative action, but rather was the action of a "Board of five members, only one of whom is a member of the Legislature". Under the Texas Constitution, the Board is authorized to act to reapportion if the Legislature fails to do so. The Board attacked by the majority in this case consisted of the Lt. Governor, the Speaker of the House of Representatives, the Land Commissioner and the Comptroller of Public Accounts, which Board acted in this case under the advice and counsel of the Attorney General of Texas. Here again, the majority concluded, "We have serious doubt that this Board did a sort of deliberate job contemplated by *Reynolds v. Sims* as worthy of judicial abstinence."[6] The Supreme Court

obviously rejected this finding of the majority in holding that the Board's actions in this reapportionment case did constitute valid State action and the redistricting plans under attack by the majority were affirmed in keeping with my Dissenting Opinion in that case.

At a time in the distant past, the test of constitutionality of State action seemed to depend on whether or not it could be shown that the action was arbitrary, unreasonable or capricious. As Mr. Jutice Brandeis stated in the case of *O'Gorman and Young*, presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the action.[7] See also "The Presumption of Constitutionality", 31 Col. L. Rev. 1136, (1931).[8]

After the majority adopted the State Plan on February 19, 1976 and rejected the plaintiffs' plan, all of which action the Supreme Court affirmed, the majority in this decision have now changed their minds and have decided that the plaintiffs' plan is preferable. Why? Certainly not because the State's Plan is unconstitutionalhe majority readily concedes that both plans are absolutely constitutional, but rather base their decision on the new and unheard-of concept solely on *"EQUITABLE CONSIDERATIONS"*. (Emphasis added.) This is totally contrary to the holding in *Whitcomb v. Chavis*[9] and its progeny which holds:

> "But we have insisted that the challenger carry the burden of proving that multi-member district unconstitutionally operate to dilute or cancel the voting strength of racial or political elements."

The Supreme Court further concludes in this case that there is "no evidence that all of the multi-member districts were conceived as purposeful devices to further racial or economic discrimination".[10]

This dictatorial and unconstitutional usurpation of political power by this type of "government by judicial decree" demonstrates the reasons that Federal Judges are being constantly reminded by State officials, constitutional lawyers, editorial writers, newspapers, television, radio and other media that our system of government was designed by our founders to be a democratic one. . .that this country by the Declaration of Independence, the Bill of Rights and the Constitution itself, divorced itself from monarchs, life tenured despots and tyrants and they further contend that this should include the arbitrary, unwarranted and unconstitutional intrusion of Federal Judges into the democratic processes of the State governments.

In this particular case, after adopting the Plan submitted by the State of Texas in 1976, the majority again failed to respond to the inquiry submitted to us by the Supreme Court as to whether or not this case was, by the adoption of single-member districts, rendered "moot". Instead, the majority followed its past policy and attempted to keep continuing jurisdiction over this case as it had in the past, in effect retaining the power to manage every detail of the affairs of the State of Texas in reapportionment matters as it has done during the past almost seven years, and it again opted in 1976 to endeavor to retain control over the administration of this State's legislative, executive and local subdivisions of government in Tarrant County. Apparently, the majority has an inordinate determination to continue its domination of the sovereign State of Texas in this reapportionment case by such perpetual unconstitutional intrusion in and usurpation of those democratic processes which are clearly and unequivocally reserved by the Constitution of the United States to all of the sovereign States. How can the Judiciary expect others to abide by the Constitution and support it when the Federal Judges flagrantly violate it

in this fashion?

As I pointed out in *Graves v. Barnes No. 2*, it cannot be denied that this type of legislative reapportionment civil rights case is an emotionally charged one in which competing political philosophies and methods often clash and unrestrained and electrifying charges of racial or other ethnic discrimination are heatedly made.[11] This is an area in which the Federal Judiciary must, indeed proceed with extreme caution.[12]

The remedy of imposing Court drawn single-member districts is the most radical that equity could require and is one which should be imposed only after setting aside on supportable grounds other alternatives found adequate. *Whitcomb v. Chavis*, 403 U.S. at page 160, *supra*.

The Supreme Court has repeatedly admonished that the District Courts". . .should not pre-empt the legislative task nor 'intrude upon State policy more than necessary. . .'" *White v. Weiser*, supra, 412 U.S. at page 795, 93 S. Ct. at page 2355. Thus, ". . .judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adquate opportunity to do so. *Reynolds v. Sims*, *supra*, at 586. *See also White v. Weiser*, *supra*, 412 U.S. at Pages 794-795, 93 S. Ct. at Page 2348. Furthermore, the approval of these plans by the representatives from each district is a clear expression of legislative intent. Also, assuming even that plaintiffs' plan is preferable, which I dispute, judicial courtesy would require the adoption of a plan which has been previously approved as constitutional by this Court and adopted by separate distinct resolutions of the two Houses of the State Legislature as well.

Since the sole and only reason that the Supreme Court

returned this case to us was to determine whether or not the State's voluntary adoption of "single-member" to replace "multi-member" legislative districts throughout the State was now moot, I feel that we should address ourselves to this question, although the majority has not done so. In this connection, I respectfully submit that in Texas the single-member districts created in all of the 254 Counties now provide all of the body politic and voters with effective access to the political process and having attained these goals it is now time for the surrogate Federal Courts to step aside and again let Democracy run its course.

From the beginning the Supreme Court has recognized that reapportionment is solely a matter for State determination, usually by the State Legislature, and determination and judicial relief becomes appropriate only when the legislative intent to reapportion according to Federal constitutional standards and requirements is not met. *Reynolds v. Sims*, 377 U.S. 533, 586 (1964). In *White v. Weiser*, 412 U.S. 783 at Page 797 (1973), the United States Supreme Court held:

> "Just as a federal district court, in the context of legislative reapportionment, should follow the *POLICIES AND PREFERENCES OF THE STATE, AS EXPRESSED IN STATUTORY AND CONSTITUTIONAL PROVISIONS OR IN THE REAPPORTIONMENT PLANS PROPOSED IN THE STATE LEGISLATURE*, whenever adherence to state policy does not detract from the requirements of the Federal Constitution, we hold that a district court should similarly honor state policies in the context of congressional reapportionment. *IN FASHIONING A REAPPORTIONMENT PLAN OR IN*

CHOOSING AMONG PLANS. A DISTRICT COURT SHOULD NOT PRE-EMPT THE LEGISLATIVE TASK NOR INTRUDE UPON STATE POLICY ANY MORE THAN NECESSARY." (Emphasis added.)

It must also be observed that the Mexican-American community in Tarrant County favors neither plan, but has submitted a third plan for consideration by the Court.

In a situation like the present one, where alternative reapportionment plans are before the Court, we are obligated to choose the plan that most nearly approximates the reapportionment plan of the State Legislature, while satisfying constitutional requirements. *White v. Weiser*, 412 U.S. 783 at 797.

The instant case is unique in many ways from the cases establishing the standards to be applied in the area of one-man, one-vote, one of which is that it marks the only occasion known to this Court when the one-man, one-vote principle has been applied to only a few districts involved in the selection of the representative body. The nine State representatives elected from the districts in question will be only nine of the 150 members of the Texas House of Representatives. Whatever plan we adopt, the people of Tarrant County will find themselves in districts that are both larger and smaller than other legislative districts in the State, which is permissible as affording reasonable guarantees of equal protection to the voters of the entire State under *White v. Regester*, 412 U.S. 755 (1973).

Last year in this very case in adopting the State's plan, we approved redistricting plans that were drawn for legislative districts in Jefferson County and Nueces County in the same manner as described by

Representative Schieffer for Tarrant County, i.e., district lines were redrawn in an effort to resolve objections raised by the United States Attorney General. The deviation among districts approved by this Court for Jefferson County was 8.1% and Nueces County was 10%.

As we noted in 1976, it would seem beyond dispute that 7.7% deviation in an apportionment plan adopted by a State legislature does not violate the Federal constitutional requirements of one-man, one-vote. *Graves v. Barnes*, 408 F. Supp. 1050, 1053 (1976). Also, as the United States Supreme Court in 1973 made clear by correcting us in this same case, not all population deviations must be justified by "acceptable reasons" grounded in State policy. *White v. Regester*, 412 U.S. 755, 761 (1973). It is also clear that the present plan does embody legitimate and identifiable state policy and the legislative intent is crystal clear.

Of course, a Court-ordered plan "must be held to higher standards than a State's own plan". *Chapman v. Meier*, 420 U.S. 1, 95 S. Ct. 751, 42 L. Ed. 2d 766 (1975). Unless there are persuasive justifications, a Court-ordered reapportionment plan of a State legislature must ordinarily achieve the goal of pupulation equality with little more than *de minimis* variation. *Connor v. Finch*, ___U.S.___, 97 S.Ct. 1828, 1833, (1977); *Chapman v. Meier, supra*, 420 U.S. at 26-27. Substantial population deviations such as 19.3% and 16.5% for legislative districts, "simply cannot be tolerated in a court-ordered plan in the absence of some compelling justification". *Connor v. Finch*, 97 S. Ct. 1828 at Page 1835.

Even ignoring the imprimatur of the Texas Legislature and the local subdivisions within Tarrant County as to the State plan, it is interesting to observe

that the plan's deviation of 7.7% is certainly not of the magnitude of the ones in *Connor* or the 20.14% found in *Chapman v. Meier, supra,* and does not require a compelling justification. Apparently, no Court has ever found a deviation of 7.7% to be unacceptable in a court-ordered plan. To the contrary, we have ourselves previously approved plans of 8.1% and 10% for districts in Texas and other Courts have approved plans with similar deviations. *E.G., Perry v. City of Opelousas,* 515 F.2d 639 (5th Cir., 1975) (6.2%); *Chapman v. Meier,* 407 F. Supp. 649 (D.N.D. 1975), on remand from 420 U.S. 1 (1975), (6.6%).

This Court is left, however, with the task of deciding whether the present plan's deviation of 7.7% is beyond the threshold of plans that are acceptable without any justification. *See Parnell v. Rapides Parish School Board,* 425 F. Supp. 399 (W.D. La. 1976). The situation is not unlike the one we initially confronted in this very case in 1972 when we read the cases to require the State of Texas to justify its deviation of 9.9%. The Supreme Court corrected us in this very case in that error. *White v. Regester, supra.*

The results of the 1976 election under the State Court's adopted present plan which is now under attack are undisputed. Of the nine members elected, one is Black, the remaining are Anglo. Strictly in terms of proportional representation, by race, the result is that the Black population, which makes up approximately 11.7% of the total population of Tarrant County, has elected a member of the Texas Legislature who represents 11.1% of the total population. There is no Mexican-American Representative, but it has been asknowledged that the 6% Mexican-American population is scattered throughout Tarrant County. This mechanistic method of determining equality of access by proportional representation, however, is

inappropriate. *White v. Regester, supra,* 412 U.S. at 765; *Whitcomb v. Chavis, supra,* 403 U.S. at 149; *Kirksey v. Board of Supervisors of Hinds County,* 554 F. 2d 139, 143 (1977). The real determiner is whether members of the group in question can participate in the political processes and elect legislators of their choice, whatever may be their race. *White v. Regester, supra.*

In arguing that the present plan is unacceptable as a court-ordered plan, plintiffs rely exclusively on *Kirksey v. Board of Supervisors of Hinds County,* 554 F. 2d 139 (1977) (en banc) and the full meaning of this case remains uncertain while it awaits United States Supreme Court review.

This case was originally instituted by other plaintiffs in 1971 and, as previously noted has been before the Supreme Court since 1972 in one form or another. There is little wonder, after the Supreme Court had granted its latest Petition for Certiorari in this case in 1976 (after the State had voluntarily adopted single member districts to replace its multi-member districts), the Supreme Court promptly remanded this case back to this Court "for reconsideration in light of the recent Texas Reapportionment legislation and for dismissal if the case is, or becomes, moot." *White v. Regester,* 95 S. Ct. 2670 (1975). It is paradoxical that the majority has not once since this case was referred back to this Court in 1976 even addressed itself to the Supreme Court's Mandate to determine "mootness" which was the only reason for its return to us.

Seemingly, the majority is determined to continue this as a perpetual case always open to new charges, additional suits and other controversies and complaints from anyone and everyone, apparently desirous of having this 1971 case "go on and on" ad infinitum, somewhat like Tennyson's proverbial "Brook".

As heretofore observed, the Supreme Court has recognized that reapportionment is exclusively and solely the responsibility of the States, primarily the legislative bodies thereof. Judicial relief becomes appropriate only when the challenging plaintiff proves by a preponderance of the evidence that the State has failed to create a plan that meets constitutional requisites. *Whitcomb v. Chavis, Reynolds v. Sims* and *White W. Weiser, supra.* "The challenger has the burden to establish and prove that the State Plan *UNCONSTITUTIONALLY OPERATES TO DILUTE OR CANCEL THE VOTING STRENGTH OF RACIAL OR POLITICAL ELEMENTS."* *(Whitcomb v. Chavis,* emphasis added.) If, in fact, the Court does find the plan unconstitutional, it must then use "equitable discretion" and "principle" to fashion a new plan for the district. However, the Court cannot use *"equitable discretion"* or "determine whether it may stand as a matter of *principle"* (emphasis added) to determine the plan's validity, *vel non,* as the majority has done in this case, since this first threshold question must be determined solely and exclusively on constitutional grounds before it reaches the equitable question of fashioning a plan. *(Whitcomb v. Chavis, Reynolds v. Sims* and *White v. Weiser, supra.)*

The implications of this novel and latest extension of judicial management into the purely State and local reapportionment affairs (WHERE CONSTITU—TIONAL CONSIDERATIONS ARE ADMITTEDLY NOT CONTROLLING) are shocking and perhaps are monumental in scope. If these new standards adopted by the majority stand as unchallenged judicial precedent in Texas and in other sovereign States, the thicket in this thorny legal area will indeed become totally impenetrable. Such unparalleled and unprecedented "Government by Judicial Decree" is unfortunate and

contemplates and encourages the spawning of endless and uncertain needless litigation in this very sensitive and controversial field of State-Federal relations.

CONCLUSION

1. Since even the majority holds that the present plan does not unconstitutionally "dilute or cancel the minority" voting strength or access to the political process, the present plan which has the imprimatur of the State Legislature and all of the political and governmental subdivisions in Tarrant County as well as the prior approval of this Court, which action was affirmed by the Supreme Court, this Three Judge Court has the obligation and responsibility to adopt the present plan as a final plan.

2. While the present single-member district reapportionment plan for Tarrant County is sufficient as a State legislatively adopted plan, it also conforms to all the requirements for a Court-ordered reapportionment plan under all judicial precedent.

3. Since the plaintiffs, as the challengers, have not sustained their burden to establish the State's Plan, which is also this Court's adopted Plan, to be an unconstitutional Plan, it must be reaffirmed and readopted by this Court.

4. In response to the specific inquiry of the Supreme Court, I would find that the Texas Reapportionment Plan now in existence is constitutional and would, therefore, *HOLD THIS CASE IS NOW MOOT.*

S/S

John H. Wood, Jr.
United States District Judge
Western District of Texas

Footnotes

1. *See, e.g. Escalante v. White*, 410 F. Supp. 1050. This Court's adoption of the State Plan was affirmed by inference by the Supreme Court when this case was returned to this Court for a determination of mootness. It has occurred to me that I might comment on the fact that if the Courts continue to take over and manage the reapportionment duties of the various States and adopt a Plan, the parties should be able to rely on the integrity and fairness of the U.S. Courts to adopt and maintain well-considered districting plans. Litigants should be able to rely on the Supreme Court as a Court of final jurisdiction whose decisions are final and consistent. Litigants should not, in making plans for the future involving heavy financial and business commitments, be relegated to the sorry proposition that litigation before the Federal Courts is decided by case-by-case ticket and a decision like a railroad ticket is good for this trip and this trip only. The majority of this Court should submit to the decision of the Supreme Court and proceed, as directed, to a determination of the mootness issue.

2. *Graves v. Barnes (Graves III)*, 408 Supp. 1050 (W.D. Tex. 1976 (3-judge court). Reference to this earlier opinion will reflect, in pertinent part, the history of this protracted litigation. See also, *Graves v. Barnes (Graves I)*, 343 F. Supp. 704 (W.D. Tex. 1972); *Graves v. Barnes (Graves II)*, 378 F. Supp. 640 (W.D. Tex. 1973).

3. *Graves v. Barnes (Graves III) supra.*

4. *Graves v. Barnes (Graves I)*, 343 F. Supp. 704 (1972).

5. 424 U.S. 636 (1976).

6. *Graves v. Barnes (Graves I), supra.*

7. *O'Gorman and Young v. Hartford Fire Ins. Co.*, 282 U.S. 251, 51 S. Ct. 130, 75 L. Ed. 324.

8. *Graves v. Barnes (Graves I)*, 343 F. Supp. 749.

9. 403 U.S. 124, 144, 91 S. Ct. (1858) 29 L. Ed. 2d 363 (1971).

10. *Graves v. Barnes (Graves III) supra.*

11. 378 F. Supp. 640 (1974).

12. *Graves v. Barnes (Graves II), supra*, at pages 683-684.

ORDER

Based upon the Memorandum Opinion heretofore entered by the Court on the 1st day of November, 1977, it is

ORDERED that:

(1) Legislative District 32 of the Texas House of Representatives is hereby reapportioned into single-member representative districts for the 1978 primary and general elections and thereafter in conformance with the appended Exhibit A;

(2) Article III, Section 7, of the Constitution of the State of Texas, as it pertains to the one-year district residence for State Representatives, is hereby suspended for the 1978 primary and general elections for those candidates for Texas House of Representatives,by suspended for the 1978 primary and general elections for those candidates for Texas House of Representatives from District 32; however, such candidates must have resided in the territory encompassed by the combined area of Districts 32A through 32I for the requisite period of time provided by the Texas Constitution and law; and

(3) The issue of attorneys' fees is reserved for later disposition by the Court.

SIGNED and ENTERED this *10th* day of November, 1977.

S/S

Irving L. Goldberg
United States Circuit Judge
Fifth Judicial Circuit

S/S

William Wayne Justice
United States District Judge
Eastern District of Texas

District 32-A

Census Tracts 3, 4, 9, 10, 11, 18, 17, 32, 33, 16, 34, 39, 38, 45.02, 45.01, 45.03, 40, 2.02, 8, all Census Tract 46.04 except Blocks 208, 209, 210, 211, 217, 218, 219, 220, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312; the following blocks of Census Tract 44, Blcoks 113, 114, 206, 207, 217, 301, 302, 303, 304, 408, 409.

District 32-B

Census Tracts 37.01, 37.02, 36.01, 36.02, 63, 62, 64, 46.02, 46.03, 61.01, 61.02, 59, 60.02, 111.01, 111.02, 46.01, 46.05; the following blocks of Census Tract 13, Blocks 303, 307, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320; the following blocks of Census Tract 46.04, Blocks 208, 209, 210, 211, 217, 218, 219, 220, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312; all Census Tract 35 except Blocks 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719.

District 32-C

Census Tracts 115.01, 216,03, 226, 225, 216.01, 14.03, 14.01, 65.02, 65.03, 65.04, 65.01, 133.01, 133.02, 14.02, 132.02, 138; all Census Tract 13 except Blocks 303, 307, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320; all Census Tract 65.05 except Blocks 101, 103, 107, 109; the following blocks of Census Tract 134.02, Blocks 601, 622, 624.

District 32-D

Census Tracts 115.02, 227, 228, 229, 219, 130, 220, 221, 223, 224, 222, 216.02, 217.01, 217.02, 218, 131.

District E

Census Tracts 132.01, 134.01, 136.02, 135.02, 135.01, 136.01, 137; the following blocks of Census Tract 65.05, Blocks 101, 103, 107, 109; all Census Tract 134.02 except Blocks 601, 622, 624.

District F

Census Tracts 102, 101, 103, 12.02, 1.01, 1.02, 50.03, 2.01, 50.01, 50.02, 49, 140.02, 140.01, 5.01, 12.01, 15, 139; and the following blocks of Census Tract 35, Blocks 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719.

District G

Census Tracts 5.02, 104.02, 104.01, 66, 105, 7, 106.01, 107.01, 107.02, 21, 20, 67, 6, 19, 31, 29, 41, 30, and Census Tract 141 except enumeration Districts 30 and 46.

District H

Census Tracts 52, 23.01, 23.02, 24.01, 24.02, 51, 106.02, 22, 25, 26, 27, 53, 42.02, 54.02, 54.01, 42.01; the following blocks of Census Tract 28, Blocks 204, 205, 206, 207, 208, 210, 211, 212, 213, 229, 301.

District I

Census Tracts 43, 48.01, 56, 55.01, 55.02, 55.04, 57.01, 57.02, 58, 60.01, 109, 48.02, 55.03, 47; all Census Tract 28 except Blocks 204, 205, 206, 207, 208, 210, 211, 212, 213, 229, 301; all Census Tract 44 except Blocks 113, 114, 206, 207, 217, 301, 302, 303, 304, 408, 409; and that portion of Census Tract 110.02 north of Sycamore School Road.

ORDER

Upon consideration of Defendants' Application for Stay of an Order of A Three-Judge District Court,

ORDERED that Defendants' Application is hereby denied.

SIGNED and ENTERED this *2nd* day of December, 1977, *nunc pro tunc* November 20, 1977.

S/S

William Wayne Justice
United States District Judge
Eastern District of Texas

NOTICE OF APPEAL

Notice of Appeal filed
21 November 1977

Notice is hereby given that Dolph Briscoe, Governor of the State of Texas, and Steven C. Oaks, Secretary of State of the State of Texas, Defendants in the above-named civil action, hereby give notice of appeal to the United States Supreme Court pursuant to 28 U.S.C. §1253 from the Order entered by the Three-Judge District Court for the Western District of Texas on the 10th Day of November, 1977.

Dated this *20th* day of November, 1977.

Respectfully submitted,

JOHN L. HILL
Attorney General of Texas

DAVID M. KENDALL
First Assistant

S/S
STEVE BICKERSTAFF
Assistant Attorney General
Chief, State & County Affairs

DAVID A. TALBOT, JR.
Assistant Attorney General

P.O. Box 12548
Capitol Station
Austin, Texas 78711
(512) 475-3131

Attorneys for Defendants

Notice of Appeal filed on
21 November 1977

CERTIFICATE OF SERVICE

I, Steve Bickerstaff, Assistant Attorney General of Texas, do hereby certify that a true and correct copy of the above Defendants' Notice of Appeal has been placed in the United States Mail, postage prepaid, certified, return receipt requested, to: Mr. Don Gladden, Attorney at Law, 702 Burk Burnett Building, Fort Worth, Texas, 76102; Mr. Joaquin Avila, Attorney, Mexican-American Legal Defense Fund, 501 Petroleum

Commerce Building, 201 North St. Mary's Street, San Antonio, Texas; and Mr. David Richards, Attorney at Law, 600 West 7th Street, Austin, Texas, 78701, on this the *20*th day of November, 1977.

S/S
STEVE BICKERSTAFF

SUPREME COURT OF THE UNITED STATES

OFFICE OF THE CLERK

WASHINGTON, D.C. 20543

December 5, 1977

Steve Bickerstaff, Esquire
Assistant Attorney General
Supreme Court Building
P.O. Box 12548
Austin, Texas 78711

Re: *Dolph Briscoe, Governor of Texas, et al. v. Frank Escalante, et al., A-453* (USDC for WD Texas No. A-71-CA-142, et al.)

Dear Sir:

The Court today entered the following order in the above-entitled case:

"The application for stay of the mandate of the United States District Court for the Western District of Texas, entered November 10, 1977, presented to Mr. Justice Powell and by him referred to the Court, is granted pending the timely filing and disposition of an appeal in this Court. Mr. Justice Blackmun took no part in the consideration or decision of this application."

Very truly yours,

Michael Rodak, Jr., Clerk

By

Deputy Clerk

cc: Don Gladden, Esquire
702 Burk Burnett Bldg.
Fort Worth, Texas 76102

Clerk, U.S. District Court
U. S. Courthouse
200 West 8th Street
Austin, Texas 78701

SUPREME COURT OF THE UNITED STATES

OFFICE OF THE CLERK

WASHINGTON, D.C. 20543

December 12, 1977

Steve Bickerstaff, Esq.
Assistant Attorney General
Supreme Court Building
Post Office Box 12548
Austin, Texas 78711

RE: DOLPH BRISCOE, GOVERNOR OF TEXAS, ET AL., *v. FRANK ESCALANTE, ET AL., NO. A-453* (USDC for WD Texas No. A-71-CA-142, et al.)

Dear Sir:

The Court today entered the following order in the above entitled case:

"The motion to reconsider the stay granted by this Court on December 5, 1977, and for other relief is denied. Mr. Justice Blackmun took no part in the consideration or decision of this motion."

Very truly yours,

Michael Rodak, Jr., Clerk

By

Laurene P. Gill,
Deputy Clerk

cc: Don Gladden, Esq.
702 Burk Burnett Building
Forth Worth, Texas 76102

Clerk, U.S. District Court
U.S. Courthouse
200 West 8th Street
Austin, Texas

Depiction of 1976 Reapportionment Plan and State's 1977 Alternative Reapportionment Plan

1976 Plan. The following is a demographic and statistical depiction of the plan submitted by the State and adopted by the court in 1976:

District	Total Population	%Deviation*	%Black	Brown%	Minority	Average Mean Income
32-A	74,023	- .8%	2.02%	3.3%	5.32%	$12,570
32-B	75,105	+ .6%	.64%	3%	3.64%	12,561
32-C	72,690	-2.6%	3.50%	2.7%	6.2%	14,537
32-D	78,502	+5.1%	9.2%	4.5%	13.7%	13,009
32-E	76,973	+3.1%	1.7%	3.8%	5.5%	11,380
32-F	77,112	+3.3%	25.28%	19.35%	4.63%	8,244
32-G	74,923	+ .3%	.25%	3.12%	3.37%	12,523
32-H	73,042	-2.1%	60.31%	3.78%	64.09%	8,530
32-I	75,429	+1.0%	2.54%	12.78%	15.32%	9,610

*Deviation shown that over or under the average population of State Representative districts in Texas.

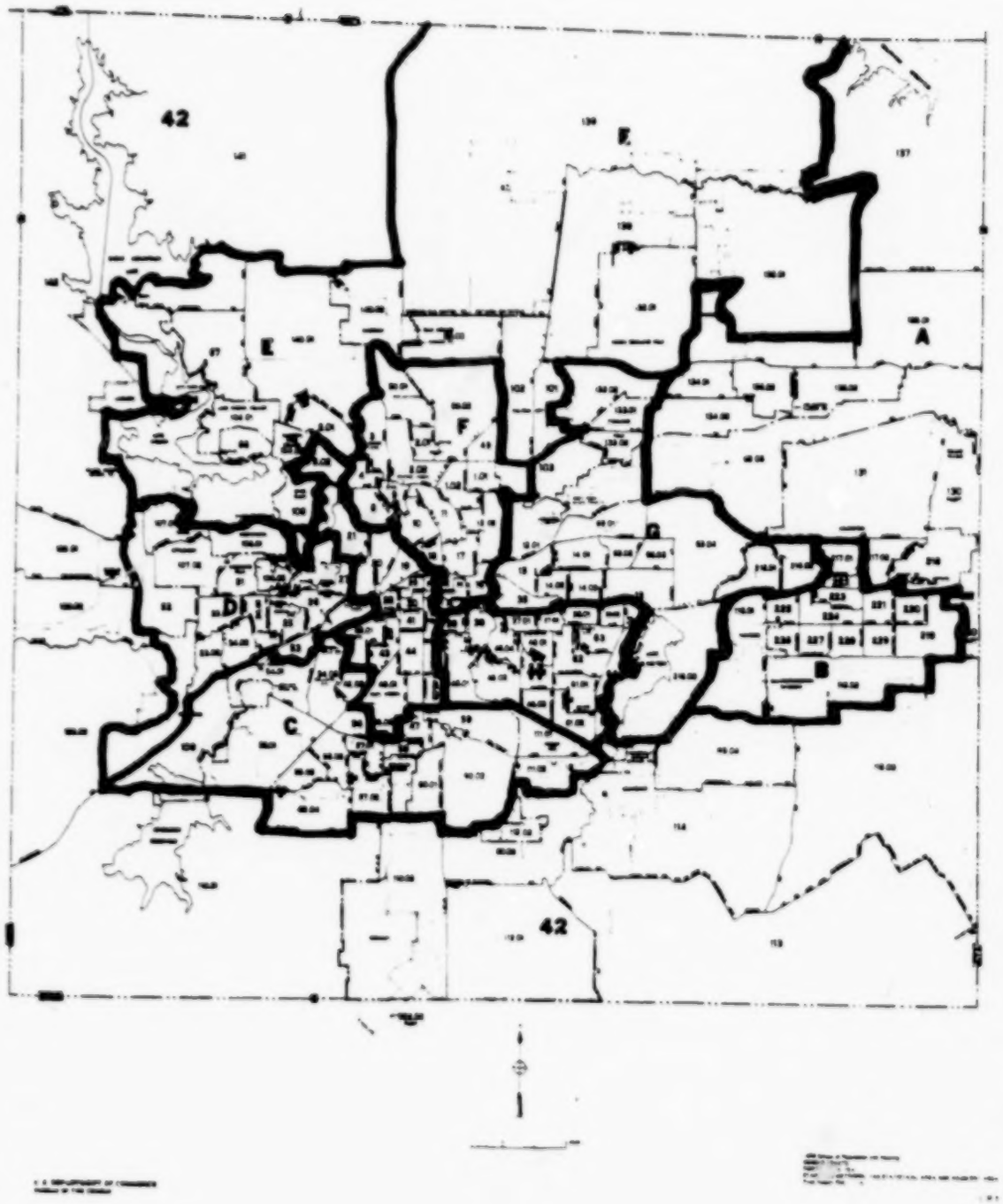
Total population deviation ranged from plus 5.1% to a minus 2.6% for a total of 7.7%.

Statistical Depiction of 1977 Plan

Districts	Deviation From Population Equality According to the Population of Tarrant County*
32-A	-0.03%
32-B	-0.54%
32-C	+0.01%
32-D	-0.25%
32-E	-0.05%
32-F	-0.35%
32-G	+1.15%
32-H	-0.05%
32-I	+0.12%
Maximum Total Population Deviation	1.69%

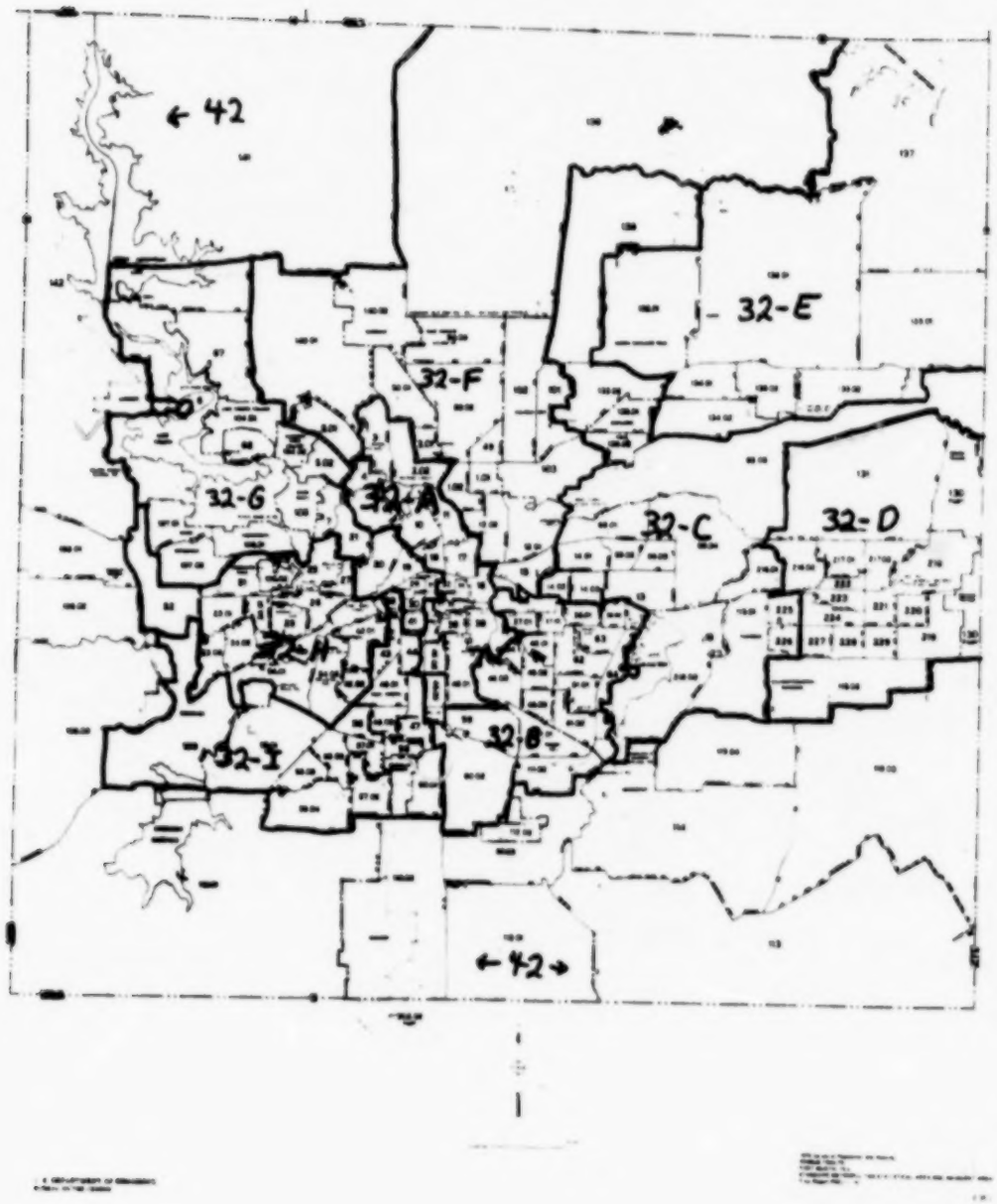
*Deviation for the 1976 Plan is computed on the basis of the deviation from population equality according to the population of legislative districts statewide.

CENSUS TRACTS IN THE FORT WORTH, TEX. SMSA AND ADJACENT AREA
INSET A: FORT WORTH AND VICINITY



CENSUS TRACTS IN THE FORT WORTH, TEX SMSA AND ADJACENT AREA

MAP OF 1977 PLAN



Enrolled

By: Meier, Andujar S.R. No. 2

SENATE RESOLUTION

WHEREAS, The 64th Legislature, in Chapter 727, Acts of the 64th Legislature, 1975, established single-member legislative districts for District 32 in Tarrant County; and

WHEREAS, On February 19, 1976, the United States District Court for the Western District of Texas entered an order reapportioning those single-member legislative districts in Tarrant County encompassed by Districts 32A through 32I of Chapter 727, Acts of the 64th Legislature, 1975; and

WHEREAS, That order has been in effect since the date of issuance and the 1976 elections were conducted in accordance with that plan, in which elections one Black and one Republican were elected to represent two of those districts; and

WHEREAS, The election of these representatives indicates that the plan embodied in that order is effective to broaden participation in the political processes; and

WHEREAS, The districts drawn in that order conform with the judicial and legislative intent of ensuring the representation of minorities, including the Mexican-American population of Tarrant County, which is separate and diverse from other ethnic minority populations in Tarrant County; and

WHEREAS, The districts drawn in that order are effective to protect the integrity of the various political subdivisions in Tarrant County, including the City of Fort Worth and the surrounding cities, towns, and villages; and

WHEREAS, The districts drawn in that order closely parallel the districts drawn by the legislature in Chapter 727, Acts of the 64th Legislature, 1975; and

WHEREAS, Changes in the boundary lines of the districts drawn in that order would hinder enforcement of the election laws of the State of Texas by those charged with enforcement; now, therefore, be it

RESOLVED by the Senate of the State of Texas, That the Senate hereby approve of the legislative districts drawn in the court order of February 19, 1976, and encourage the United States District Court for the Western District of Texas to make that existing order, which establishes the following districts, final:

32A. That part of Tarrant County included in census tracts 130, 131, 134.01, 134.02, 135.01, 135.02, 136.02, 137, 217.02, and 218, that part of census tract 65.05 East of the Handley-Ederville Road, and that part of census tract 136.01 included in census enumeration district 129 South of State Highway 121 and census block groups 3, 4, and 5;

32B. That part of Tarrant County included in census tracts 115.01, 115.02, 217.01, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, and 229;

32C. That part of Tarrant County included in census tracts 42.02, 54.01, 54.02, 55.01, 55.02, 55.03, 55.04, 56, 57.01, 57.02, 58, 59, 60.01, 60.02, 111.01, and 111.02, that part of census tract 47 South of Gambrell Street, that part of census tract 109 South of U.S. Highway 377 and South of Old Benbrook Road, and that part of census tract 110.02 North of Sycamore School Road;

32D. That part of Tarrant County included in census tracts 22, 23.01, 23.02, 24.01, 24.02., 25, 26, 27, 51, 52, 53,

106.01, 106.02, 107.01, and 107.02 and that part of census tract 109 North of U.S. Highway 377 and North of Old Benbrook Road;

32E. That part of Tarrant County included in census tracts 5.01, 6, 50.03, 66, 67, 101, 102, 104.01, 105, 132.01, 138, 139, 140.01, 140.02, and that part of census tract 136.01 included in census enumeration districts 9A, 9B, 9C, 12, 14, 39, and 39B and that part of census enumeration district 129 North of State Highway 121, and that part of census tract 141 included in census enumeration district 47;

32F. That part of Tarrant County included in census tracts 1.01, 1.02, 2.01, 2.02, 3, 4, 8, 9, 10, 11, 12.02, 16, 17, 18, 32, 33, 34, 49, 50.01, 50.02, and that part of census tract 103 West of Haltom Road;

32G. That part of Tarrant County included in census tracts 12.01, 14.01, 14.02, 14.03, 15, 35, 65.01, 65.02, 65.03, 65.04, 132.02, 133.01, 133.02, 216.01, 216.02, 216.03, and that part of census tract 13 North of the Texas and Pacific Railway and that part of census tract 65.05 West of Handley-Ederville Road and that part of census tract 103 East of Haltom Road;

32H. That part of Tarrant County included in census tracts 36.01, 36.02, 37.01, 37.02, 38, 39, 45.01, 46.01, 46.02, 46.03, 46.04, 46.05, 61.01, 61.02, 62, 63, 64, and that part of census tract 13 South of the Texas and Pacific Railway and that part of census tract 45.02 East of Bryan Street; and

32I. That part of Tarrant County included in census tracts 5.02, 7, 19, 20, 21, 28, 29, 30, 31, 40, 41, 42.01, 43, 44, 45.03, 48.01, 48.02, and that part of census tract 45.02 West of Bryan Street and that part of census tract 47 North of Gambrell Street.

S/S

President of the Senate

I hereby certify that the above Resolution was adopted by the Senate on July 11, 1977. _____

S/S

Secretary of the Senate

MASTER FILE **ENROLLED**

H.S.R. No. 2

R E S O L U T I O N

WHEREAS, The 64th Legislature, in Chapter 727, Acts of the 64th Legislature, 1975, established single-member legislative districts for District 32 in Tarrant County; and

WHEREAS, On February 19, 1976, the United States District Court for the Western District of Texas entered an order reapportioning those single-member legislative districts in Tarrant County encompassed by Districts 32A through 32I of Chapter 727, Acts of the 64th Legislature, 1975; and

WHEREAS, That order has been in effect since the date of issuance and the 1976 elections were conducted in accordance with that plan, in which elections one Black and one Republican were elected to represent two of those districts; and

WHEREAS, The election of these representatives indicates that the plan embodied in that order is effective to broaden participation in the political processes; and

WHEREAS, The districts drawn in that order conform with the legislative intent of ensuring the representation of minorities, including the Mexican-American population of Tarrant County, which is separate and diverse from other ethnic minority populations in Tarrant County; and

WHEREAS, The districts drawn in that order are effective to protect the integrity of the various political subdivisions in Tarrant County, including the city of Fort Worth and the surrounding cities, towns, villages;

and

WHEREAS, The districts drawn in that order closely parallel the districts drawn by the legislature in Chapter 727, Acts of the 64th Legislature, 1975; and

WHEREAS, Changes in the boundary lines of the districts drawn in that order would hinder enforcement of the election laws of the State of Texas by those charged with enforcement; now, therefore, be it

RESOLVED, by the House of Representatives of the State of Texas, That the house hereby approve of the legislative districts drawn in the court order of February 19, 1976, and encourage the United States District Court for the Western District of Texas to make that existing order, which establishes the following districts, final:

32A. That part of Tarrant County included in census tracts 130, 131, 134.01, 134.02, 135.01, 135.02, 136.02, 137, 217.02, and 218, that part of census tract 65.05 East of the Handley-Ederville Road, and that part of census tract 136.01 included in census enumeration district 129 South of State Highway 121 and census block groups 3, 4, and 5;

32B. That part of Tarrant County included in census tracts 115.01, 115.02, 217.01, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, and 229;

32C. That part of Tarrant County included in census tracts 42.02, 54.01, 54.02, 55.01, 55.02, 55.03, 55.04, 56, 57.01, 57.02, 58, 59, 60.01, 60.02, 111.01, and 111.02, that part of census tract 47 South of Gambrell Street, that part of census tract 109 South of U.S. Highway 377 and South of Old Benbrook Road, and that part of census tract 110.02 North of Sycamore School Road;

32D. That part of Tarrant County included in census tracts 22, 23.01, 23.02, 24.01, 24.02, 25, 26, 27, 51, 53, 106.01, 106.02, 107.01, and 107.02 and that part of census tract 109 North of U.S. Highway 377 and North of Old Benbrook Road;

32E. That part of Tarrant County included in census tracts 5.01, 6, 50.03, 66, 67, 101, 102, 104.01, 104.02, 105, 132.01, 138, 139, 140.01, 140.02, and that part of census tract 136.01 included in census enumeration districts 9A, 9B, 9C, 12, 14, 39, and 39B and that part of census enumeration district 129 North of State Highway 121, and that part of census tract 141 included in census enumeration district 47;

32F. That part of Tarrant County included in census tracts 1.01, 1.02, 2.01, 2.02, 3, 4, 8, 9, 10, 11, 12.02, 16, 17, 18, 32, 33, 34, 49, 50.01, 50.02, and that part of census tract 103 West of Haltom Road;

32G. That part of Tarrant County included in census tracts 12.01, 14.01, 14.02, 14.03, 15, 35, 65.01, 65.02, 65.03, 65.04, 132.02, 133.01, 133.02, 216.01, 216.02, 216.03, and that part of census tract 13 North of the Texas and Pacific Railway and that part of census tract 65.05 West of Handley-Ederville Road and that part of census tract 103 East of Haltom Road;

32H. That part of Tarrant County included in census tracts 36.01, 36.02, 37.01, 37.02, 38, 39, 45.01, 46.01, 46.02, 46.03, 46.04, 46.05, 61.01, 61.02, 62, 63, 64, and that part of census tract 13 South of the Texas and Pacific Railway and that part of census tract 45.02 East of Bryan Street; and

32I. That part of Tarrant County included in census tracts 5.02, 7, 19, 20, 21, 28, 29, 30, 31, 40, 41, 42.01, 43, 44, 45.03, 48.01, 48.02, and that part of census tract 45.02 West of Bryan Street and that part of census tract 47 North of Gambrell Street.

Speaker of the House

I certify that H.S.R. No. 2 was adopted by the House on July 11, 1977, by a non-record vote.

Chief Clerk of the House

RESOLUTION NO._____

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF ARLINGTON, TEXAS IN SUPPORT OF THE SINGLE MEMBER LEGISLATIVE DISTRICTS AS THEY NOW EXIST.

WHEREAS, the U.S. District Court for the Western District of Texas has under consideration a proposal for redrawing the Single Member Legislative Districts for District 32 comprising Tarrant County, Texas; and,

WHEREAS, Legislative District 32, containing the City of Arlington, Texas is presently under an interim plan which has been in effect for the last two years; and,

WHEREAS, the existing plan recognizes that the City of Arlington and the Communities contiguous thereto do represent a common community of interest comprising approximately one-third of the poulation of

Tarrant County; and

WHEREAS, the existing plan does provide for such community's representation in proportion to such entitlement; and

WHEREAS, an alternative proposed plan known as the Gladden Plan would dilute such representation below that to which such community of common interest is entitled; and

WHEREAS, implementation of such plan would clearly contribute to voter confusion, lack of confidence and probably more voter apathy; and

WHEREAS, the current plan reflects representation for all persons in a fair and equitable manner.

NOW, THEREFORE BE IT RESOLVED that the City Council of the City of Arlington, Texas in regular session does herewith endorse and commend to the U.S. Didstrict Court for the Western District of Texas the existing single member legislative district plan heretofore adopted by such Court and does record its opposition to the alternate Gladden Plan proposed in lieu thereof.

ADOPTED, this the 23rd day of August, 1977.

APPROVED:

S. J. STOVALL, MAYOR

ATTEST:

City Secretary

RESOLUTION NO.__ _____

A RESOLUTION OF THE MAYOR'S COUNCIL OF TARRANT COUNTY IN SUPPORT OF THE SINGLE MEMBER DISTRICTS AS THEY NOW EXIST.

WHEREAS, the U.S. District Court for the Western District of Texas has under consideration a proposal for redrawing the Single Member Legislative Districts for Tarrant County, Texas; and,

WHEREAS, Legislative District 32 is presently under an interim plan which has been in effect for the last two years; and,

WHEREAS, any new plan would contribute to voter confusion, lack of confidence and probably more voter apathy; and,

WHEREAS, the area encompassed by several of the proposed districts would be so large that the "communities of interest" would be fragmented—particularily rural areas; and,

WHEREAS, the Tarrant County Commissioners' Court, in realigning voter precincts for the 1978 elections took great pains to avoid splitting City limit lines; and the proposed plan would split a minimum of six (6) corporate boundary lines; and,

WHEREAS, the current plan reflects representation for all persons in a fair and equitable manner; and,

WHEREAS, the proposed plan, also known as the Gladden Plan, represents an exercise in the manipulation of district lines that would tend to abort the purpose of single member districts.

NOW, THEREFORE, BE IT RESOLVED that the MAYORS' COUNCIL OF TARRANT COUNTY goes on record as endorsing the plan presently being used and totally objects to the proposed plan before the U. S. District Court.

SIGNED this *25th* day of *July*, 1977.

MAYORS' COUNCIL OF
TARRANT COUNTY

ATTEST:

By: S/S
L. Don Dodson

REVIEW OF POSSIBLE EFFECTS OF PROPOSED "GLADDEN PLAN" FOR STATE LEGISLATIVE REDISTRICTING ON CITY OF FORT WORTH'S EXISTING SINGLE MEMBER DISTRICT PLAN FOR ELECTION OF CITY COUNCIL MEMBERS

(1) The proposed "Gladden Plan" was compared with the Forth Worth Single Member District Plan for possible effects on the boundaries and pupulation makeup of Fort Worth's currently adopted plan for electing City Council members. The Gladden Plan is drawn with U.S. Census Tracts as the basic geographic unit, while the City of Fort Worth Single Member Plan employs Tarrant County Voting Precincts as its geographic base.

(2) Because census tract boundaries and voting precinct boundaries are not coincident, it appears that a minimum of fourteen (14) precincts within the City of Fort Worth would require modification in boundaries if the "Gladden Plan" should be ordered for election of State Legislators.

(3) These fourteen precinct modifications would affect an estimated population of 19,830 persons, or 5.0% of the City's 1970 population,[1] *at a minimum*. These boundary changes would also affect an estimated *minimum* of 1876 persons of Spanish-language Spanish-surname heritage within the City. (This number represents 5.6% of Mexican-American population in Fort Worth in 1970.)

An estimated *minimum* of 1331 Blacks would be affected by the precinct boundary modifications. (This represents 1.7% of the Black population in Fort Worth in 1970.)

The fourteen precincts requiring modification, the total population affected by the change, and the racial makeup of the area affected by the change is shown in the attached table.

(4) An apparent split in Precinct 119 could have a substantial effect on the Eighth City Council District, which has a predominantly minority population. This "split" created by the proposed "Gladden Plan" could place approximately 1022 Black persons into a City Council District that is predominantly White in racial composition.

(5) The proposed "Gladden Plan", if implemented, could have a substantial impact on the composition, population totals, and racial integrity of the existing City of Fort Worth Single Member District Plan for election of City Council members. Since

census tracts are used as a geographic base, redrawing of certain precincts will be a necessity to accommodate the new plan. The impact outlined in this analysis should be emphasized as being the *minimum* possible change that would be necessitated. If more substantial modifications are made in the existing Voting Precinct boundaries, then the effects on the integrity of Fort Worth's Single Member District Plan for election of Council Members will increase concomitantly.

[1]U.S. Census of Population and Housing, U.S. Bureau of the Census; 1970, Final Report PHC (1)-74 Fort Worth, Texas SMSA

Prepared by: Forth Worth
City Planning Dept.
July 29, 1977

ANALYSIS OF PRECINCT MODIFICATIONS REQUIRED IN CITY OF FORT WORTH IF "GLADDEN PLAN" IS IMPLEMENTED

Precincts Requiring Revision	Total Population Affected	Mexican-American Population Affected	Black Population Affected
Precinct 75	479	34	0
Precinct 188	0	0	0
Precinct 104	276	11	251
Precinct 119	1055	17	1022
Precinct 62	606	51	3
Precinct 77	1101	94	3
Precinct 97	1240	105	2
Precinct 76	737	94	3
Precinct 95	1014	37	8
Precinct 14	8	0	0
Precinct 163	2354	14	1
Precinct 51	6890	1292	0
Precinct 108	367	13	1
Precinct 88	3703	114	38
TOTALS	19830	1876	1332

Prepared by Fort Worth
City Planning Dept.
July 12, 1977

REPRESENTATIVE DISTRICTS
POPULATION AND DEVIATION
AS PASSED BY THE 64TH LEGISLATURE
EFFECTIVE FOR 1976 ELECTIONS
(AVERAGE DISTRICT, 74,645)

District	Population	Over (Under)	Percent Deviation Over (Under)
1	76,285	1,640	2.2
2	77,102	2,457	3.3
3	78,943	4,298	5.8
4	71,928	(2,717)	(3.6)
5	73,217	(1,428)	(1.9)
6	76,051	1,406	1.9
* 7A	71,946	(2,699)	(3.6)
* 7B	76,324	1,679	2.2
* 7C	77,974	3,329	4.5
8	71,170	(3,475)	(4.7)
9	76,813	2,168	2.9
10	72,410	(2,235)	(3.0)
11	73,136	(1,509)	(2.0)
12	74,704	59	.1
13	75,929	1,284	1.7
14	76,597	1,952	2.6
15	76,701	2,056	2.8
16	74,218	(427)	(.6)
17	74,493	(152)	(.2)
18	77,159	2,514	3.4
19A	74,713	68	.1
19B	73,944	(701)	(.9)
20	75,592	947	1.3
21	74,651	6	.0
22	73,311	(1,334)	(1.8)
23	75,777	1,132	1.5
24	73,966	(679)	(.9)
25	75,633	988	1.3
26	Not used - See districts 33A through 33R.		
27	77,788	3,143	4.2
28	72,367	(2,278)	(3.1)
29	76,505	1,860	2.5
30	77,008	2,363	3.2
31	75,025	380	.5
*32A	74,023	(622)	(.8)
*32B	75,105	460	.6
*32C	72,690	(1,955)	(2.6)
*32D	78,502	3,857	5.1
*32E	76,973	2,328	3.1

* Changed by United States District Court--Western District of Texas--Austin, Texas--February 9, 1976

District	Population	Over (Under)	Percent Deviation Over (Under)
*32F	77,112	2,467	3.3
*32G	74,923	278	3.7
*32H	73,042	(1,603)	(2.1)
*32I	75,429	784	1.1
33	73,071	(1,574)	(2.1)
33A	73,695	(950)	(1.3)
33B	73,712	(933)	(1.2)
33C	73,825	(820)	(1.1)
33D	73,853	(792)	(1.1)
33E	73,808	(837)	(1.1)
33F	73,835	(810)	(1.1)
33G	73,652	(993)	(1.3)
33H	73,706	(939)	(1.3)
33I	73,600	(1,045)	(1.4)
33J	73,822	(823)	(1.1)
33K	73,735	(910)	(1.2)
33L	73,683	(962)	(1.3)
33M	73,805	(840)	(1.1)
33N	73,781	(864)	(1.2)
33O	73,734	(911)	(1.2)
33P	73,706	(939)	(1.3)
33Q	73,597	(1,048)	(1.4)
33R	73,772	(873)	(1.2)
34	76,071	1,426	1.9
35A	74,161	(484)	(.7)
35B	73,392	(1,253)	(1.7)
36	74,633	(12)	(.0)
37A	73,882	(763)	(1.0)
37B	73,789	(856)	(1.2)
37C	74,062	(583)	(.8)
37D	73,783	(862)	(1.2)
38	78,897	4,252	5.7
39	77,363	2,718	3.6
40	71,597	(3,048)	(4.1)
41	73,678	(967)	(1.3)
42	72,406	(2,239)	(3.0)
43	74,160	(485)	(.6)
44	75,278	633	.8
45	78,090	3,445	4.6
46	Not used - See districts 57A through 57K.		
47	76,319	1,674	2.2
*48A	77,788	3,143	4.2
*48B	70,304	(4,341)	(5.8)
*48C	71,964	(2,681)	(3.6)
49	76,254	1,609	2.2
50	74,268	(377)	(.5)

* Changed by United States District Court--Western District of Texas--Austin, Texas--February 9, 1976

District	Population	Over (Under)	Percent Deviation Over (Under)
51	72,737	(1,908)	(2.6)
52	76,601	1,956	2.6
53	74,499	(146)	(.2)
54	77,505	2,860	3.8
55	76,947	2,302	3.1
56	74,070	(575)	(.8)
57	77,211	2,566	3.4
57A	75,343	698	1.0
57B	75,551	906	1.2
57C	75,741	1,096	1.5
57D	74,748	103	.1
57E	74,857	212	.3
57F	75,837	1,192	1.6
57G	74,473	(172)	(.2)
57H	76,375	1,730	2.3
57I	74,313	(332)	(.4)
57J	74,549	(96)	(.1)
57K	74,911	266	.4
58	75,120	475	.6
59A	73,451	(1,194)	(1.6)
59B	74,607	(38)	(.1)
60	75,054	409	.5
61	73,356	(1,289)	(1.7)
62	72,240	(2,405)	(3.2)
63	75,191	546	.7
64	74,546	(99)	(.1)
65	75,720	1,075	1.4
66	72,310	(2,335)	(3.1)
67	75,034	389	.5
68	74,524	(121)	(.2)
69	74,765	120	.2
70	77,827	3,182	4.3
71	73,711	(934)	(1.3)
72A	73,889	(756)	(1.0)
72B	74,329	(316)	(.4)
72C	74,815	170	.2
72D	74,737	92	.1
73	74,309	(336)	(.5)
74	73,743	(902)	(1.2)
75A	73,767	(878)	(1.2)
75B	75,334	689	.9
76	74,704	59	.1
77	77,704	3,059	4.1
78	71,900	(2,745)	(3.7)
79	75,164	519	.7
80	75,111	466	.6

District	Population	Over (Under)	Percent Deviation Over (Under)
81	75,674	1,029	1.4
82	76,006	1,361	1.8
83	75,752	1,107	1.5
84	75,634	989	1.3
85	71,564	(3,081)	(4.1)
86	73,157	(1,488)	(2.0)
87	73,073	(1,572)	(2.1)
88	75,076	431	.6
89	74,206	(439)	(.6)
90	74,377	(268)	(.4)
91	73,381	(1,264)	(1.7)
92	71,908	(2,737)	(3.7)
93	72,761	(1,884)	(2.5)
94	73,328	(1,317)	(1.8)
95	73,825	(820)	(1.1)
96	72,505	(2,140)	(2.9)
97	74,202	(443)	(.6)
98	72,352	(2,293)	(3.1)
99	74,123	(522)	(.7)
100	75,682	1,037	1.4
101	75,204	559	.7

NO. 77-1033

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

* * *

DOLPH BRISCOE, ET AL, Appellants

V.

FRANK ESCALANTE, ET AL, Appellees

* * *

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

* * *

MOTION TO DISMISS AND IN THE ALTERNATIVE TO AFFIRM

* * *

DON GLADDEN
702 Burk Burnett Building
Fort Worth, Texas 76102

VILMA S. MARTINEZ
JOAQUIN G. AVILA
LINDA HANTEN
MORRIS J. BALLER
Mexican American Legal Defense and Education Fund, Inc.
201 N. St. Mary's St.
501 Petroleum Commerce Building
San Antonio, Texas 78205

January 31, 1978

I N D E X

TABLE OF AUTHORITIES

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

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NO. 77-1033

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DOLPH BRISCOE, ET AL
Appellants

V.

FRANK ESCALANTE, ET AL
Appellees

* * *

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

* * *

MOTION TO DISMISS
AND IN THE ALTERNATIVE TO AFFIRM

* * *

Now come appellees Frank Escalante, et al, plaintiffs-intervenors below and Rosa Maria Gonzalez Moreno, et al, plaintiffs below and move that this appeal be dismissed or in the alternative that the decision below be affirmed.

STATEMENT OF THE CASE

Following this Court's affirming the decision of the District Court to apportion Dallas and Bexar Counties' multi-member districts and remanding this case for further proceedings (White v. Regester, 412 U.S. 755 [1973]), plaintiffs-intervenors below and appellees herein filed a separate suit and motion seeking consolidation and to intervene in this case challenging the constitutionality of multi-member District 32 (Tarrant County). Following a hearing on December 3, 4, and 5, 1973, the same three judges who heard Graves v. Barnes, 343 F. Supp. 704 (W.D. Tex. 1972) announced on December 21, 1973, that among other districts, multi-member Legislative District 32 in Tarrant County denied plaintiffs and plaintiffs-intervenors below equal access to the political process and on January 28, 1974, after further hearing ordered the plan proposed by plaintiffs-intervenors below be used for the 1974 elections and thereafter.

The State applied to and was granted a stay by Mr. Justice Powell on February 2, 1974.

The defendants below duly perfected their appeal to this Court. Oral argument was heard on February 19, 1975.

Following oral argument, the Texas Legislature adopted House Bill 1097, which undertook to abolish all multi-member legislative districts in Texas and upon passage of such legislation being called to this Court's attention, this Court on June 30, 1975, remanded

this case to the District Court:

> "for reconsideration in light of the recent Texas reapportionment legislation and for dismissal if the case is or becomes moot." White v. Regester, 422 U.S. 935 (1975).

Following the 1975 remand, the State of Texas came under the Voting Rights Act (42 USC 1973 as amended, 1975) and after submission of H.B. 1097 to the Department of Justice pursuant to Section 5 thereof, the Department of Justice on January 23, 1976, made its objection to that portion of H.B. 1097 which applied to State Representative District 32 (Tarrant County).

Following a hearing on February 9, 1976, the District Court on February 19, 1976, citing "exigencies of time" adopted the plan of defendants below and appellants herein as a temporary plan "for use in the 1976 elections" and retained jurisdiction for further hearing after the 1976 elections if warranted.

The plan adopted by the District Court as a temporary plan contained population deviation among the nine districts of 7.7% with over half containing population deviations in excess of 2% from absolute population equality. Due to hasty outer boundary changes necessitated by adoption of H.B. 1097, the plan of plaintiffs-intervenors below contained one district with a population deviation of 2% while the other eight districts remained within 1% of absolute population equality.

Plaintiffs-intervenors below gave notice of appeal from the 1976 order and filed an application for stay upon the premise that the 7.7% deviation in the court's temporary plan coupled with over half the districts exceeding 2% deviation from absolute population equality was impermissible as a court-ordered plan as it conflicted with this Court's supervisory guidelines announced in Chapman v. Meier, 420 U.S. 1 (1975). Mr. Justice Powell referred the application for stay to the full Court and on March 1, 1976, this Court denied relief.

Following the filing of several motions by the plaintiffs-intervenors below, the District Court scheduled a hearing on July 12, 1977, which was continued at the request of defendants below and appellants herein. On September 7 and 8, 1977, the District Court heard additional evidence. At that time, plaintiffs and plaintiffs-intervenors below tendered to the Court as a proposed permanent plan the one which was adopted by the District Court in 1974 modified only to conform to outer boundary changes occasioned by the passage of H.B. 1097 and to more closely conform to standards for a court-ordered reapportionment plan announced by this Court in Chapman, supra, (after the plan was submitted to the District Court in 1974) and reiterated in Conner v. Finch, 431 U.S. 407 (1977). With these modifications, the plan of plaintiffs-intervenors below produced a total deviation among the districts of 1.69% with only one district exceeding .6% from absolute population equality.

On October 31, 1977, citing constitutional principles announced in Reynolds v. Sims, 377 U.S. 533 (1964), and the District Court's "exercise of equitable discretion", the District Court adopted as its permanent plan the one proposed by plaintiffs and plaintiffs-intervenors below and appellees herein. On November 10, 1977, the District Court entered its formal order adopting the plan proposed by plaintiffs and plaintiffs-intervenors below as the permanent plan for District 32. The defendants below gave notice of appeal on November 20, 1977, and on the 21st day of November, 1977, presented an application for stay to Mr. Justice Powell which was by him referred to the full Court and granted on December 5, 1977.

ARGUMENT

THE APPEAL WAS NOT TIMELY DOCKETED AND SHOULD BE DISMISSED.

Appellants in filing their application for stay stated at page 6 thereof:

> "Notice of Appeal
>
> Petitioners on November 20, 1977, filed their notice of appeal with the United States District Clerk for the Western District of Texas. The notice is attached to this application as Appendix E."

Following the filing of their notice of appeal, appellants "on this the 20th day of November, 1977," placed a true and correct copy of the application for stay in the United States mail to the attorney for appellees as certified on page 33 of

appellants' application by the attorney for appellants.

Appellants did not docket the case in the manner set forth in Rule 13 of this Court within the time prescribed therein. This case was docketed on January 20, 1978, more than 60 days after notice of appeal was filed with the District Court. Inasmuch as appellants have failed to docket this case within the time prescribed by Rule 13, the Court should grant this Motion to Dismiss the appeal herein. Shapiro v. Doe, 396 U.S. 488 reh den 397 U.S. 970 (1970).

DOES THE PLAN ADOPTED BY THE DISTRICT COURT COMPLY WITH THE COMMON LAW OF VOTING RIGHTS REMEDIES AND SUPERVISORY GUIDELINES OF THIS COURT?

In the alternative, the decision of the District Court is correct and should be affirmed. Even before Chapman v. Meier, supra, appellees in their proposed plan sought to achieve a constitutionally sufficient plan to alleviate the deficiencies of multi-member District 32 without transgressing upon the well-established constitutional principle announced in Reynolds v. Sims, supra. In their 1974 submission, the total deviation among the districts proposed by appellees was 1.3%. In 1976 and 1977, charged with guidelines established by this Court in Chapman, appellees modified their plan so as to more closely conform to the standards established by this Court for court-ordered plans in their submission of a proposal to the District Court for its adoption as a plan designed to rectify the constitutional deficiencies of multi-member District 32 while

also conforming to the standards of Reynolds and Chapman.

By contrast, more than a year after Chapman, in February of 1976 and again in 1977, appellants sought adoption by the District Court of a plan which contained a 7.7% deviation unsupported by the existence of "historically significant state policy or unique features" necessitating departure from the goal of population equality (H.B. 1097 had less than 6.5% deviation among the nine districts of District 32) and one which neither the appellants nor the Court could "articulate clearly the relationship between the variance and any such state policy furthered." (Chapman v. Meier, supra) The District Court in examining alleged state policies concluded that while the maintenance of existing member-constituent relationships is a justifiable state policy and that it is well served in the 1976 plan, the District Court was unable to conclude as required by Chapman a relationship between the variance and that state policy.[1]

---

[1]While no incumbents were paired under appellants' plan, only one pair presently exists among the incumbent representatives in appellees' plan inasmuch as two representatives paired under appellees' plan have elected not to seek re-election. The single pair presently existing has resulted from a change of residence of each of the paired representatives since the plan was originally presented in 1974.

Citing "exigencies of time" and over the vigorous objections of appellees which led to an application to this Court for relief, the District Court in 1976 stated that

> "The troublesome question for another day is whether Chapman significantly modified the Mahan standard in relation to court-ordered plans."

When the District Court in 1977 reconvened to adopt permanent relief it assumed its responsibility of tackling this "troublesome question". In the interim, it received additional direction from this Court in its opinions in East Carroll Parish School Board v. Marshall, 424 U.S. 636, and Connor v. Finch, supra, as to the importance and priority of the guidelines so clearly established in Chapman. Although the District Court in adopting a permanent plan turned its decision on "equitable discretion", the permanent plan adopted conforms in all respects to the Supreme Court's guidelines and the District Court properly used these guidelines rather than obscure suggestions of possibly conflicting state policy and political considerations.

The District Court in its conclusion said:

> "Our conclusion today is that the present scheme of districting in Tarrant County produces greater population disparities than necessary to effectuate any coherent and legitimate state policy. We

> accordingly adopt that plan which is, if at all, only marginally less effective in implementing identifiable state interests, and which comes significantly closer to achieving the goal of equal apportionment. This result we believe to be obligatory, both as a matter of constitutional principle, and as the product of the exercise of our equitable discretion."

Although numerous inquiries were made of appellants' witnesses what "important and significant state considerations" rationally mandated departure from the Chapman standards and the relationship between those considerations making the deviation necessary, no "historically significant state policy or unique features" were ever established nor are any "historically significant state policy or unique features" mentioned in appellants' Jurisdictional Statement, much less a showing that the deviation in appellants' plan is necessary to preserve such non-existent state policy.

District courts and litigants who tender reapportionment plans for consideration by districts courts are and should be required to conform such proposals to previously established guidelines enunciated by this Court in pursuance to its supervisory authority over district courts. Appellees herein have conscientiously undertaken to comply with the guidelines of Chapman while appellants ignored these guidelines and rather than reduce the under 6.5% deviation in H.B. 1097 as it related to District 32, chose

to increase that deviation more than 1% without in any manner articulating the necessity even for 6.5% as contained in H.B. 1097, much less the 7.7% in the plan which they say the District Court is obligated to adopt.

Appellants rely upon White v. Weiser, 412 U.S. 783 (1973) and attempt to establish state "goals" as requiring the District Court to accept a plan which is inconsistent with the above mentioned guidelines of Chapman. Appellants failed even to establish discernable state goals. There was no evidence of a state policy or goal claimed by appellants of favoring the representative-constituent relationship for State Legislative seats, only the preference of 8/9ths of the State Representatives from District 32 who drafted the appellants' plan. Their preference is understandable. Mr. Justice White for the Court accurately reflected in White v. Weiser, supra:

> "Of course, the District Court should defer to state policy in fashioning relief only where that policy is consistent with constitutional norms and is not itself vulnerable to legal challenge. The District Court should not, in the name of state policy, refrain from providing remedies fully adequate to redress constitutional violations which have been adjudicated and must be rectified."

DID THE DISTRICT COURT ABUSE ITS DISCRETION IN ADOPTING THE PLAN OF APPELLEES RATHER THAN THAT OF THE APPELLANTS?

In examining appellants' contention that the District Court abused its discretion, it is necessary for this Court to consider factual claims of appellants. This Court has consistently held, and appropriately so, that an appellate court must determine that fact findings of the district court are clearly erroneous in order to support reversal.

As Mr. Justice White, speaking for the Court in Zenith Radio Corp. v. Hazeltine Research, 395 U.S. 100, said:

> "The authority of an appellate court, when reviewing the findings of a judge as well as those of a jury, is circumscribed by the deference it must give to decisions of the trier of the fact, who is usually in a superior position to appraise and weigh the evidence. The question for the appellate court under Rule 52(a) is not whether it would have made the findings the trial court did, but whether 'on the entire evidence [it] is left with the definite and firm conviction that a mistake has been committed.' [Citations omitted]."

Leaving fact finding to the district court is particularly appropriate when reversal is urged on the basis of "abuse of discretion". There are numerous

factual claims in the Jurisdictional Statement which are untrue or at best have only limited evidence in support thereof.

There is no suggestion in the Jurisdictional Statement that state policy or unique features necessitated the deviation contained in appellants' plan.

Factual claims at pages 15 and 25 of the Jurisdictional Statement and inferences therefrom suggest substantial impact upon the Fort Worth Independent School District and the City of Fort Worth. There is no evidence in the record as to the effect of the court-ordered plan on recently enacted legislation purporting to establish single member districts for the Fort Worth Independent School District. That legislation (Chapter 23, Texas Education Code, Article 23.023, as amended 1977) has been objected to by the Justice Department and is of no force and effect.

Factual claims at pages 9 and 15 of the Jurisdictional Statement (referring to the Appendix at page 71, et seq.) inferring impact on Fort Worth city council districts likewise are untrue and are not supported by the evidence. It is understandable that the District Court did not discuss the impact of the 1977 plan on the city council districts of Fort Worth when the author of the "Review of Possible Effects" (page 71, Appendix, Jurisdictional Statement), Darrell Noe, a witness for appellants, on cross-examination related that these effects were "not necessarily probable and certain outcomes" and that "I en-

titled my review 'possible effects'" (page 242, Trial Record). Mr. Noe further testified:

> "Q (By Gladden) All right. So this impact on these 19,830 people would be impacted only if the county chose to draw precinct lines which conflicted with the present City Council district lines?
>
> A That's correct.
>
> * * *
>
> Q So really we are talking about three precincts --
>
> A Major changes.
>
> Q --that would require significant numbers to be changed and they would be being changed from an over-populated district to an under-populated district?
>
> A Yes." (page 220, Trial Record)

In addition, Mr. Noe has since repudiated the alleged impact stating that his testimony was based "only on hypothesis" and that the appellees' plan now will require only minor modifications of the Fort Worth City Council Districts. This repudiation is shown as Appendix A hereto.

Another allegation of concern is the suggestion of adverse minority impact, particularly as to State Representative Leonard Briscoe and his district (page 19, Jurisdictional Statement). State

Representative Briscoe, a Black and a former city councilman of the City of Fort Worth, is the only member of an ethnic minority ever to be elected a State Representative from Tarrant County and credits this litigation for his presence in the Texas House of Representatives. State Representative Briscoe testified in favor of the permanent plan adopted by the District Court both in 1976 before he was elected to the legislature and again at the September, 1977 hearing.[2]

Factual allegations of "...approval of all the democratically elected City Council and other local governmental bodies within the County of Tarrant" (page 9, Jurisdictional Statement) and "... the plan unanimously endorsed by the pertinent political bodies" (page 11, Jurisdictional Statement) are not in any wise supported by the evidence. Neither the resolution of the Tarrant County Mayors Council (page 70, Appendix, Jurisdictional Statement) nor the resolution of the Arlington City Council (page 68, Appendix, Jurisdictional

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[2]State Representative Briscoe's testimony also reflects that the reason no legislative plan was enacted during the 1977 special session was because the Tarrant County delegation could not agree upon a plan and for this reason the Governor refused to expand his "call" to include legislative redistricting in the special session.

Statement) were unanimous.[3]

More importantly, the City Council of the City of Fort Worth representing more than 57% of the population situated in District 32 took no action for or against either plan. Adoption of resolutions in support of appellants' plan by the House of Representatives (page 65, Appendix, Jurisdictional Statement) and the Texas Senate (page 61, Appendix, Jurisdictional Statement) were not unanimous.[4]

Other factual claims, such as administrative inconvenience and expense, have at best limited evidence in support thereof with the greater weight being against these claims.

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[3]The record is silent as to the Arlington City Council vote although Dr. Sam Hamlett, a member of the Arlington City Council and head of the Political Science Department of the University of Texas at Arlington, cast his dissenting vote on that resolution.

[4]Although voting in the House of Representatives was by voice vote, State Representative Leonard Briscoe as well as many other minority members (both black and Mexican-American) recorded their vote against the resolution.

The above instances of evidentiary disputes are by no means inclusive but they demonstrate clearly why this Court has traditionally and wisely left "fact finding" to the district court and appropriately resolved that the district court made findings of fact in support of its judgment. It is respectfully suggested that there is no showing that the District Court abused its discretion.

CONCLUSION

Inasmuch as the appellants failed to docket this case within the time required by Rule 13, this appeal should be dismissed or in the alternative since the judgment of the District Court conforms to all guidelines established by this Court for a court-ordered apportionment plan and is one consistent with powers of the District Court in its exercise of equitable discretion in forming remedial relief it should in all things be affirmed.

The appeal of appellants should be dismissed or in the alternative the judgment of the District Court should be affirmed.

Respectfully Submitted,

VILMA S. MARTINEZ
JOAQUIN G. AVILA
LINDA HANTEN
MORRIS J. BALLER
DON GLADDEN

By: _____
Don Gladden

14d FORT WORTH STAR-TELEGRAM ■ THURSDAY MORNING, NOVEMBER 24, 1977

Official says deposition based on hypothesis

By ROBERT MAHONEY
Star-Telegram City Hall Writer

Fort Worth Assistant Planning Director Darrell Noe, on whose deposition Texas Attorney General John Hill relied in his appeal to the U.S. Supreme Court on a federal court decision redistricting Tarrant County's legislative districts, said Wednesday his deposition was based "only on hypothesis."

Noe said "conditions have changed" since he filed that deposition in August because he said the city and county have worked together "to minimize the impact" on the city's single-member district boundary lines created by a redistricting plan approved by attorney Don Gladden and the federal court.

"We (the city) have no axe to grind either in favor of or in opposition to it (the Gladden plan)," Noe said. "The only reason why I filed a deposition was to protect the integrity of the single-member district plan in Fort Worth and to express the city's concerns on what impact it could have had on us."

In his deposition, Noe said the Gladden plan "could have a subtantial impact on the composition, population total and racial integrity" of the city's existing single-member districts.

He said, however, that the key word in that statement is "could" and he said the impact of the Gladden plan now will require only minor modifications of the council district lines.

• • •

SOME 14 VOTING precincts would be affected by the modification, but Noe said most of those precincts lie on the periphery of the city.

Although nearly 20,000 persons could be affected by the precinct changes, Noe said only 3,000 persons would find themselves in a different council district, if the Supreme Court upholds the federal court decision.

In a related development Wednesday, Gladden filed the second of two responses with U.S. Supreme Court Associate Justice Lewis Powell asking him not to grant a stay of the lower court's ruling that would allow his redistricting plan to become effective.

Hill is seeking a stay of the court's ruling because he said it would cause "irreparable harm" for the city and the school district.

The city and the school district have single-member district plans based on voting precinct lines, while Gladden's plan would base such districting on census tracts exclusively.

• • •

IN THE BRIEF, Gladden included a Tuesday morning Star-Telegram story quoting Noe's statement that the affect of the Gladden plan on the city's single-member districts would be minimal.

The effect would not be of the magnitude quoted in Hill's request and it should not be used in making a decision on whether the lower court's decision should stand, Gladden said.

In the previous story, Noe said that two council district lines would have to be redrawn before the next council election in April 1979.

Pcts. 77 and 97 "may have to be pulled from" District 9 on the Near South Side into District 6 on the Far South Side, he said.

About 2,000 people would be affected by the shift from one district to the other, Noe said.

• • •

DISTRICT 9 is represented by Councilwoman Shirley Johnson and District 6 is represented by Councilman Woodie Woods.

Noe also said Pct. 119 in the Riverside area could be affected in the redistricting plan with the possibility that the precinct would be split between District 4 on the East Side and District 8 on the Central-East Side.

About 1,000 persons would be affected in a potential precinct split there, he said.

District 4 is represented by Councilman Jeff Davis and District 8 by Councilman Jim Bagsby.

Noe said the other changes would affect council districts that do not overlap, but are situated on the city's periphery.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

* * *

No. 77-1033

* * *

DOLPH BRISCOE, Governor of Texas and STEVEN C. OAKS, Secretary of State of the State of Texas

Appellants

V.

FRANK ESCALANTE, FRANK MOORE, JOHN DILLARD, T. R. DILLARD, and MARY DILLARD

Appellees

* * *

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

* * *

OPPOSITION TO APPELLEES' MOTION TO DISMISS AND APPELLEES' MOTION TO AFFIRM

* * *

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DOLPH BRISCOE, Governor of Texas and STEVEN C. OAKS, Secretary of State of the State of Texas,
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* * *

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

* * *

OPPOSITION TO APPELLEES' MOTION TO DISMISS AND APPELLEES' MOTION TO AFFIRM

Now come appellants Dolph Briscoe, Governor of Texas, and Steven C. Oaks, Secretary of State of Texas, defendants below, Appellants herein, and file their opposition to Appellees' motion that this appeal be dismissed and to Appellees' motion that the judgment of the court below be affirmed.

ARGUMENT AND AUTHORITIES

APPEAL WAS TIMELY DOCKETED

Appellees incorrectly cite November 20, 1977[1] as the date on which Appellants' notice of appeal was filed with the United States District Clerk of the Western District of Texas. As a result of their error, Appellees conclude that this appeal was untimely docketed because it was docketed on January 20, 1978. The notice of appeal was *mailed* on November 20, 1977, which was a Sunday. It was received by the District Clerk and filed on Monday, November 21, 1977. This fact is set out in the Jurisdictional Statement at page 2 and the notice of appeal, showing a filing on November 21, 1977, is included in the separately bound appendix at page 5l. The United States District Clerk mailed a certified copy of the notice of appeal to the United States Supreme Court on November 22, 1977. That copy showed that the notice was filed on November 21, 1977. Appellants by cover letter with this Opposition have forwarded a second certified certified copy of the notice of appeal showing a filing date of November 21, 1977. This appeal was timely docketed.

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[1]Appellees correctly quote from Appellants' Application for Stay wherein it states that "Petitioners on November 20, 1977, filed their notice of appeal . . . " It was on Sunday, November 20, 1977, that Appellants' application for stay in the court below was denied allowing an application to be mailed to Mr. Justice Powell. Because it was Sunday, however, it was not possible to file the notice of appeal at that time, so it also was mailed. The District Clerk received it by mail the following day, November 21, 1977. A clerk from the United States Supreme Court called the attorney for Appellants during the week of November 21 -- November 25, 1977, to confirm that the notice of appeal had indeed been filed on November 21, 1977 instead of November 20, 1977 as indicated in the application.

THE DECISION OF THE MAJORITY OF THE COURT SHOULD BE REVERSED AND THE 1976 PLAN LEFT IN EFFECT

The election process in Tarrant County has proceeded on the basis of existent election precincts and single-member legislative lines as a result of the action of Mr. Justice Powell in granting Appellants' Motion for Stay on December 5, 1977, after referring the matter to the full Court. Tarrant County election officers mailed voter registration certificates on December 30, 1977 to approximately 342,575 voters. These voters were registered according to existent election precincts. The registration of voters according to the 70-100 new election precincts that would have had to be drawn to comply with the 1977 plan would have required an additional 2-3 months. An official list of registered voters is now being prepared for completion by March 1, 1978. A list of voting certificates cancelled by state law is being prepared as required by Article 5.14a of the Texas Election Code. By February 6, 1978, persons had filed for the primary election for state, legislative, county, district, precinct, and congressional offices. A total of 23 candidates filed for the nine state legislative seats in Tarrant County according to the single-member districts present in the 1976 reapportionment plan. The next election to be conducted on the basis of existent voting precincts will be a bond election of the Azle Independent School District on March 11, 1978. City and school elections will follow on April 1, 1978. Primary elections for state, legislative, county, district, congressional and precinct offices will take place on May 6, 1978. Run-off primaries will occur on June 3, 1978. The general election is November 7, 1978. All of these primary and general elections will take place according to existent voting precincts and existent legislative single-member district lines unless this

Court affirms the judgment of the District Court below.

Appellees ask this Court to act at this time to affirm the judgment of the district court below. Since Appellees do not make any legal argument or cite any case that they have not previously raised before this Court in their Opposition to Appellants' Motion for Stay, Appellants can see no reason to repeat the legal arguments set out in their Application for Stay and their Jurisdictional Statement. However, Appellants feel it appropriate to reply to Appellees' apparent effort to distract this Court from the true impact of the 1977 plan on the election process in Tarrant County.

Appellees seek to focus the attention of this Court on only a single aspect of their plan's impact--the plan's effect on existing city council districts in the City of Fort Worth. The City of Fort Worth is only indirectly affected by the proceeedings in this case. It is Tarrant County, not the City of Fort Worth, that has responsibility for the conduct of state, legislative, district, county, precinct and congressional elections. The involvement of officials of the City of Fort Worth in proceedings below was motivated, as indicated in Appellees' Motion to Affirm, by their desire to protect the integrity of the city's newly established single-member city council districts. City officials were fearful that, since the city utilized state voting precincts, the redrawing of those precincts to comply with the 1977 legislative reapportionment plan would compel the City of Fort Worth to redraw its new city council lines. As indicated in Appellants' Supplement to their Application for Stay, officials from Tarrant County and the City of Fort Worth worked together, prior to this Court staying the lower court's order, to devise a scheme for redrawing state election precincts in such a manner that their impact on the city's single-member districts

would be minimized. Although it was not possible to develop a new set of election precincts that would permit the City's district lines to remain unchanged,[2] it was possible to devise a pattern of new precincts that would cause only approximately 3,000 persons to be moved from one city council district to another.[3] This minimizing of the adverse impact on city council districts is an example of good faith and the cooperation of local officials. Such cooperation is to be commended, not attacked as a "repudiation" of testimony as urged by Appellees (Motion to Affirm at 12). Although the need for realigning city council districts can be minimized by the manner in which state voting precinct lines are redrawn, the need for altering some city council districts cannot be eliminated. (Motion to Affirm at 13; Motion to Affirm, Appendix A). More importantly, however, the overall impact of the 1977 plan on Tarrant County voters and the state election process remains essentially unaffected by the minimization of impact on Fort Worth city council district lines. For example, the number of state election precincts that must be redrawn[4] and voters reregistered and separated from their present legislative representatives remains unchanged.

Appellees describe the state's argument concerning adverse impact on the election process as being one of

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[2]Under state law, election precincts drawn by the county must conform to state, district, legislative and congressional district lines. Therefore it was not possible to redraw all affected precincts in such a way as to avoid the need for changing Fort Worth City Council lines. Tex. Elec.Code, art. 2.04.

[3]Appellants wish to emphasize that this figure represents the number of persons moved from one city council district to another. It is undisputed that at least 20,000 persons in the City of Fort Worth would be affected by the required redrawing of 14 precincts within the City. (Appellees' Motion to Affirm, Appendix A).

[4]It is uncontroverted that implementation of the 1977 plan would affect 70-100 voting precincts in Tarrant County.

"administrative inconvenience and expense" and then suggest that the greater weight of the evidence below is *against such claims. Appellants' argument goes far* beyond one of inconvenience or expense and is fully supported by all of the evidence below. Appellees' assertion to the contrary flies directly in the face of the conclusion of the majority of the court below who stated:

> "Finally, we are urged, both as a matter of policy and equity, to consider that continued adherence to the present plan will have the effect of avoiding voter confusion and encouraging voter participation. Another change in the districting of Tarrant County, it is claimed, will work a disruption upon the election process, and will operate to the substantial inconvenience of those county officials responsible for implementing any electoral changes. *With all of these assertions we cannot disagree.* But we do not conclude that these arguments demonstrate the merits of one proposal over the other; they suggest, instead, the same pragmatic rational for decision that permitted only provisional relief once before." (Majority Opin., App. at 21-22)

As acknowledged above by the majority of the court and further emphasized in the Dissenting Opinion of Judge Wood, Appellees offered no evidence at the trial to contravene the evidence offered by the State of Texas that adoption of the 1977 plan would seriously disrupt the election process.

Appellees also mistakenly assert that Appellants' Jurisdictional Statement contains "no suggestion . . . that state policy or unique features necessitated the deviation contained in appellants' plan." Motion to Affirm at 12. Appellants set forth numerous state policies served by the 1976 plan that are not served in any way by the 1977 plan. *See* Jurisdictional Statement at 12-22. Among the many policies so served, perhaps

the ones constituting the most unique features of Appellants' plan are its retention of existent voting precincts and its avoidance of disruption of the election process. Appellees have never made an effort to understand the complexities of an election and to develop a plan that would avoid, or at least minimize, the adverse impact reapportionment can have on the election process and voters of Tarrant County. Instead, as explained by Appellees in their Motion to Affirm, they devised a plan in 1974 solely on the basis of 1970 census data and census tracts and made no effort at any time to modify their plan to take into consideration any legislative enactments or changing conditions in Tarrant County.

Finally, Appellants emphasize that action by this Court to affirm at this time the judgment of the court below would result in a shift between legislative districts in the middle of the election process and would not only create serious problems of voter and official confusion, but could impair the ability of the State of Texas to carry out its spring primary and general elections.

CONCLUSION

For the aforementioned reasons, Appellants pray that this Honorable Court deny Appellees' motion to dismiss this appeal and Appellees' motion to affirm the judgment of the court below. Furthermore, Appellants pray that this Honorable Court note probable jurisdiction of this case, reverse the decision of the majority below, and enter the 1976 plan as the permanent apportionment of state representative districts for former multi-member district 32, or, in the alternative, that this Honorable Court note probable jurisdiction of this case and set it for argument and plenary consideration.

Respectfully submitted,

JOHN L. HILL
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DAVID M. KENDALL
First Assistant

STEVE BICKERSTAFF
Assistant Attorney General

RICK ARNETT
Assistant Attorney General

STEVE BICKERSTAFF

Attorneys for Appellants

CERTIFICATE OF SERVICE

I, Robert S. Bickerstaff, Jr., a member of the Bar of the Supreme Court of the United States, do now enter my appearance in the Supreme Court of the United States in the above mentioned cause on behalf of the Appellants. I do hereby certify that three copies of the foregoing Opposition to Appellees' Motion to Dismiss and Appellees' Motion to Affirm have been served by placing same in the United States Mail, First Class, Certified and Postage Prepaid, on this the _____ day of February, 1978, addressed to each of the following:

Mr. Don Gladden
Attorney at Law
702 Burk Burnett Building
Fort Worth, Texas 76102

Mr. David Richards
Attorney at Law
600 West 7th Street
Austin, Texas 78701

Mr. Joaquin Avila
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